TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 56.

WILLIAM B. WESTMORE, PLAINTIFF IN ERROR,

vs.

ANNETTE B. MARROW (FORMERLY ANNETTE B. WESTMORE).

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible].

FILED [illegible], 1904.

(16,970.)

(18,970.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 319.

WILLIAM B. WETMORE, PLAINTIFF IN ERROR,

vs.

ANNETTE B. MARKOE (FORMERLY ANNETTE B. W. WETMORE).

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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Supreme Court of the State of New York, County of New York.

ANNETTE B. W. WETMORE (NOW ANNETTE B. MARKOE), Plaintiff,
against
WILLIAM B. WETMORE, Defendant.

Certified copy of record on application of the defendant for stay of proceedings, etc., for collection of arrears of alimony and allowance under judgment of April 1st, 1892, accrued prior to January 13th, 1899.

Hatch, Keener & Clute, attorneys for defendant, 100 Broadway, New York city.

Notice of Appeal from order of December 30, 1901, denying defendant's motion for an injunction.

SUPREME COURT,

NEW YORK COUNTY.

ANNETTE B W. WETMORE (now Annette B. Markoe),
Plaintiff,

vs.

WILLIAM B. WETMORE,
Defendant.

Sirs.—Take notice that the defendant herein, William B. Wetmore, hereby appeals to the Appellate Division of the Supreme Court in and for the First Judicial Department from the order herein entered and filed in the office of the Clerk of the Supreme Court, New York County, on the 30th day of December, 1901, denying the motion made in the above-entitled action by said defendant, William B. Wetmore, for an order enjoining and restraining collection and staying proceedings and actions upon arrears of alimony and support allowance, accrued on or before January 13, 1899, under the judgment of this Court, dated the 1st day of April, 1892, and which motion is more particularly described in the said order hereby appealed from. And further take notice that said de-

fendant hereby appeals from each and every part of said order.

Dated New York, January 9, 1902.

HATCH & WICKES,
Attorneys for Defendant, William B. Wetmore,
100 Broadway,
Borough of Manhattan,
New York City, N. Y.

To Messrs. JAY & CANDLER,
Attorneys for Plaintiff,
48 Wall Street,
Borough of Manhattan,
New York City, N. Y.

To THOMAS L. HAMILTON,
Clerk of the Supreme Court,
New York County.

Notice of motion, read on behalf of Defendant.

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

Notice of Motion.

Sirs.—Please take notice that upon the annexed affidavit of William B. Wetmore, verified the 18th

day of December, 1901, and the exhibits therein referred to and annexed thereto, we shall move this Court at a Special Term, Part I thereof, to be held at the County Court House in the County of New York, on the 24th day of December, 1901, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order enjoining and restraining the above-named plaintiff and her attorneys from issuing execution upon the judgment of this Court, dated the 1st day of April, 1892, or if execution has been issued, from enforcing the same in any way, for the collection of arrears of alimony and allowance for the support and education of the three children of the said plaintiff and defendant, under said decree of divorce, which accrued and became due on or before January 13th, 1899, amounting to the sum of $19,221.60, and from collecting or attempting to collect the judgment in this action, so far as relates to such arrears, or from instituting any proceeding in this action or any action or actions founded upon claims for arrears of alimony and allowance for the support of said children, and perpetually enjoining and staying all proceedings in this action or any other action founded upon such arrears or upon any cause of action arising therefrom, upon the part of the plaintiff herein, or her attorneys or agents, or on the part of any person or corporation acting or pretending to act on the part of said plaintiff, or her attorneys or agents, and for such other and further relief as to the Court may seem proper.

Dated New York, December 19th, 1901.

Yours, etc.,

HATCH & WICKES,
Attorneys for Defendant,
100 Broadway,
Borough of Manhattan,
New York City.

To Messrs. JAY & CANDLER,
Attorneys for Plaintiff,
48 Wall Street,
New York City.

10 **Affidavit of William B. Wetmore, read on behalf of defendant in support of the motion.**

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff,

against

11 WILLIAM B. WETMORE,
Defendant.

Affidavit of William B. Wetmore.

STATE OF NEW JERSEY, *County of Hudson.* } ss.:

WILLIAM B. WETMORE, being first just duly sworn, deposes and says:

I.—I am the defendant above named. For more than the six months next immediately preceding the 28th day of December, 1898, I had my domicile
12 at Radnor, in the County of Delaware, State of Pennsylvania, within the jurisdiction of the District Court of the United States for the Eastern District of Pennsylvania, and was then a bankrupt within the true meaning of the Act of Congress, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898, and then and there owed debts which I was unable to pay. On the 13th day of January, 1899, by a petition setting forth to the best of my knowledge, information and belief a list of my creditors and their respective places of residence and the amounts due to each, together with an accurate inventory of my property, rights and

credits of every name, kind and description, and the location and situation of each and every parcel and portion thereof, together with all other matters and things by said statute required to be stated which said petition was duly verified by my oath, I duly applied to the said District Court of the United States for the said Eastern District of Pennsylvania, the said Court then being held at Philadelphia, in the said District and State of Pennsylvania, before the Honorable William Butler, District Judge of the United States for the said District, and who then and there had full power and lawful authority to hold said Court by virtue of the said Act of Congress; and I did therein declare myself to be unable to meet my debts and engagements and prayed to be declared a voluntary bankrupt, pursuant to the provisions of the said Act. The said petition being then and there received and filed by the said District Court of the United States for the Eastern District of Pennsylvania, such proceedings were had thereon in said Court that afterwards, to wit, on the 13th day of January, 1899, I was duly adjudicated a bankrupt, and on the 21st day of June, 1900, an order was duly made and entered, in and by the said Court in the said matter of the proceedings in bankruptcy, duly discharging me from all debts and claims which were made provable by the Acts of Congress relating to bankruptcy, against my estate, and which existed on the 13th day of January, A. D. 1899, on which day the petition for adjudication was filed by me; excepting such debts as were by law excepted from the operation of a discharge in bankruptcy: of which order a certified copy is hereto annexed marked Exhibit A and made a part of this my affidavit.

II.—That the above-named plaintiff received due and timely notice of various proceedings which were taken under and in pursuance of the said The National Bankruptcy Act, in relation to my bank-

16 ruptcy as aforesaid, and in particular had notice of the application which was made on my behalf for the discharge in bankruptcy, appeared and filed specifications in opposition to the same, and after the said discharge had been granted, appealed from the said order granting the discharge in bankruptcy to the United States Circuit Court of Appeals in and for the Third Circuit.

That the said appeal so taken by her was duly argued before the said Court on Tuesday, the 2d day of October, 1900, and on or about the 30th day of April, 1901, was duly dismissed by the said Court and an order was duly entered, of which a
17 certified copy is hereto annexed, marked Exhibit B, and made a part of this my affidavit.

III.–That on or about the 12th day of June, 1890, the plaintiff commenced against me the above-entitled action for the purpose of obtaining from me an absolute divorce and requiring me to make a suitable provision for her support and for the maintenance and education of our three children. Thereupon such proceedings were had and taken in this action that afterwards and on or about the 1st day of April, 1892, a judgment was made in said action, a copy of which is hereunto annexed, marked Exhibit C, and made a part of this my
18 affidavit.

That in and by the said judgment it was decreed that there should be and was thereby granted unto the plaintiff the sum of three thousand dollars ($3,000) annually so long as she should live, to be paid by me to her yearly, which said annual sum of three thousand dollars was by the Court considered and deemed a suitable allowance, having regard to the circumstances of the respective parties, for the support of the plaintiff.

And also in and by the said judgment it was decreed that there should be granted and paid to the said plaintiff the sum of one thousand dollars annually for the maintenance and

education of our child Wenonah until she should attain the age of twenty-one years, and the further sum of one thousand dollars annually for the maintenance and education of our child Dagmar until she should attain the age of twenty-one years, and the further sum of one thousand dollars annually for the maintenance and education of our child Louis Hoffman until he should attain the age of twenty-one years, such payments to be made by me to the said plaintiff quarter-yearly, that is to say, on the first days of each July, October, January and April, which said annual sums, amounting together to three thousand dollars ($3,000), were by the Court considered and deemed a suitable allowance, having regard to the circumstances of the respective parties and the ages and conditions of the said children, for their maintenance and education.

On November 22d, 1894, said Annette B. W. Wetmore was married at the city of New York to Dr. James Wright Markoe, a man with an income, whose ability to support his said wife was and ever since has been and still is unquestionable, and who, ever since his said marriage, has been and still is able and willing to support her in her former station in life; that said Dr. James Wright Markoe is a physician of prominence in his profession, enjoying a lucrative practice and that his standing is of the best and highest in the city of New York; that said Annette B. W. Wetmore ever since said November, 22d, 1894, has been and still is the wife of said Dr. James Wright Markoe.

IV.—That up to the 28th day of December, 1899, there was alleged to be due to the said plaintiff, following the provisions of the said divorce judgment, the sum of $17,399.37, which was claimed by her, the said plaintiff, as arrears of alimony. That that amount was stated by me in my bankruptcy schedules at the date of verification thereof,

as being claimed to be owing to the said plaintiff, Annette B. Markoe, wife of Dr. James Wright Markoe, as a creditor for arrears of alimony.

That the said bankruptcy schedules were verified by me on the 28th day of December, 1898, and did not include the instalment on account of alimony and for support and education of the children, which became due on the first day of January, 1899, amounting to $1,500.

That the total amount of arrears claimed to be due to the plaintiff for alimony and for support and education of the children, after crediting all moneys received by said plaintiff prior to January 13, 1899, and figuring interest of debits and credits to January 13, 1899, is the sum of $19,221.60.

V.—That I have had no opportunity until the present to avail myself of the advantage of my discharge in bankruptcy.

That the debt last aforesaid arose and accrued before the filing of my petition in bankruptcy, and existed on the 13th day of January, 1899, and, being a fixed liability, as evidenced by a judgment, was a provable debt under the Bankrupt Act, and was not within one of the excepted cases specified in said Act, to wit:

Said debt was not due as a tax levied by the United States, the State, the County, District or municipality in which I resided, or otherwise.

Nor was said debt a judgment in an action for fraud or obtaining property by false pretences or false representations, or for willful and malicious injuries to the person or property of another.

Nor had said debt not been duly scheduled in time for proof and allowance, with the name of the creditor, Annette B. Markoe; and, moreover, such creditor had notice or actual knowledge of the said proceedings in bankruptcy.

Nor was said debt created by my fraud, em-

bezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity. 25

Said debt is extinguished by the said discharge in bankruptcy.

VI. –That I make this application for a stay of enforcement of the judgment of divorce by reason of the fact that the plaintiff, through her attorneys and agents, has threatened to arrest me for contempt of Court if they could find me within the State of New York.

That I desire and am ready to comply with the said judgment of divorce as soon as it shall be declared that my said discharge in bankruptcy has relieved me from the payment of the aforesaid 26 arrears.

That it is claimed and asserted by the plaintiff, through her attorneys and agents, that the said discharge is inoperative and does not affect my liability to pay arrears of alimony, and the said plaintiff threatens and intends to take proceedings and institute suits in this Court or in Courts of other jurisdictions to enforce or collect the said judgment, and I am subject to liability to arrest for contempt, and to suits and proceedings within the State of New York, based upon said judgment, notwithstanding the fact that I have been discharged from all my debts, and am no longer amenable to 27 suits, proceedings or penalties by reason of nonpayment thereof in this Court or in any Court of the United States.

WHEREFORE, I pray that an order may be made herein that the plaintiff herein and her attorneys be perpetually enjoined from issuing execution under the said judgment, or, if execution has been issued,. from enforcing the same in any way from the collection of arrears of alimony, and for the support and education of the children, under said decree of divorce, which accrued and became due on or before the 13th day of January, 1899, amounting to the

28 sum of $19,221.60, and from collecting or attempting to collect, the judgment in this action, so far as relates to such arrears, or in any other way, directly or indirectly, instituting any proceedings in this action, or any action or actions which are founded upon the claim for arrears of alimony and for the support and education of the children, and that all proceedings in this action or in any other action, founded on said arrears, or upon any cause of action arising therefrom, upon the part of the plaintiff herein, or her attorneys or agents, or on the part of any person or corporation acting or pretending to act on the part of said plaintiff, or her attorneys or agents, be perpetually enjoined
29 and stayed.

WM. BOERUM WETMORE.

Sworn to before this 18th day of December, 1901.
JOHN L. KELLER,
Master in Chcy.
of N. J.

STATE OF NEW JERSEY
County of Hudson. } ss.:

I, MAURICE J. STACK, clerk of the County of
30 Hudson and also Clerk of the Circuit Court and Court of Common Pleas, holden therein do hereby certify that John L. Keller whose name is subscribed to the *jurat* of the foregoing affidavit and therein written, was at the time of taking the oath to such affidavit a Master in Chancery duly commissioned and sworn and authorized by the laws of the said State of New Jersey to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in the State of New Jersey. And further, that I am well acquainted with the handwriting of such John L. Keller, and verily believe that the signature to said *jurat* on said affidavit is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court and County the 19th day of December, 1901. 31

MAURICE J. STACK,
[SEAL.] Clerk.

Certified copy of Decree of Discharge of Bankrupt, read on behalf of William B. Wetmore in support of motion.

Exhibit A. 32

DECREE OF DISCHARGE OF BANKRUPT.

IN THE DISTRICT COURT OF THE UNITED STATES

for the

EASTERN DISTRICT OF PENNSYLVANIA

IN BANKRUPTCY No. 27.

IN THE MATTER OF WILLIAM B. WETMORE, Bankrupt.

33

WHEREAS, William B. Wetmore, of Radnor, in the County of Delaware and the State of Pennsylvania, has been duly adjudged a bankrupt, under the Acts of Congress relating to Bankruptcy, and appears to have confirmed to all the requirements of law in that behalf: IT IS THEREFORE ORDERED by the Court that said William B. Wetmore be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 13th day of January A. D. 1899, on which day the petition for adjudication was filed by him: excepting such debts, as are by

law excepted from the operation of a discharge in bankruptcy.

WITNESS the HONORABLE JOHN B. MCPHERSON, Judge of said District Court, and the seal thereof this 21st day of June, A. D. 1900.

(Signed) HARRY E. KELLER,
Deputy Clerk District Court.

(Seal of District Court U. S.)

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the foregoing copy has been compared by me with the original discharge of bankrupt, entered and filed in my office on the 21st day of June, 1900, and now remaining in my custody as required by law among the records of said Court, and that the same is a correct transcript therefrom and of the whole of such original.

In witness whereof, I hereto subscribe my name and affix the seal of said District Court of the United States for the Eastern District of Pennsylvania, at Philadelphia, Pa., this 19th day of December, 1901.

WM. W. CRAIG,
[SEAL.] Clerk District Court United States,
Eastern District of Pennsylvania.

Certified copy of order dismissing appeal of Annette B. Markoe from decree of discharge of bankrupt, read on behalf of William B. Wetmore in support of motion. 37

Exhibit B.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 16. September Term, 1900. 38

ANNETTE B. MARKOE,
Appellant,

v.

WILLIAM B. WETMORE,
Bankrupt-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA. 39

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here

ORDERED, ADJUDGED AND DECREED by this Court that the appeal in this cause be, and the same is, hereby dismissed, with costs.

Philadelphia, April 30, 1901.

GEO. M. DALLAS,
Cir. Judge.

United States of America: Set.:

I, WILLIAM H. MERRICK, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify that the foregoing copy has been compared by me with the original decree entered April 30th, A. D. 1901, in the case of Annette B. Markoe, appellant, *vs.* William B. Wetmore, bankrupt, appellee, No. 16, September Term, 1900, on file and now remaining in my custody as required by law among the records of the said Court in my office, and that the same is a correct transcript therefrom and of the whole of such original.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 19th day of December, in the year of our Lord one thousand nine hundred and one and of the independence of the United States the one hundred and twenty-fifth.

[SEAL] WM. H. MERRICK,
Clerk United States Circuit Court
of Appeals, Third Circuit.

Decree of Divorce, read on behalf of William B. Wetmore in support of motion. 43

Exhibit C.

At a Special Term of the Supreme Court of the State of New York, held at the Court House, in the City and County of New York, on the first day of April, 1892.

Present: Hon. EDWARD PATTERSON, Justice.

44

ANNETTE B. W. WETMORE,
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

Judgment.

The summons and a copy of the complaint in this action having been personally served upon the defendant on the twelfth day of June, 1890, in the State of New York, and the defendant having appeared in this action by his attorneys and served an answer to the complaint in this action, putting 45 in issue the allegations of adultery made by the complaint, and the Court having by its order directed the trial by a jury of that issue, and the questions to be tried having been prepared and settled as prescribed by Section 970 of the Code of Civil Procedure, and the jury impaneled to try said issues having found by their verdict upon said trial that the defendant, William B. Wetmore, has committed the several acts of adultery alleged in the complaint, except the act charged to have been committed on the 23d day of March, 1889, and the Court having tried the remaining issues of

fact in this action, and having appointed John B. Pine Referee, to take proof and to ascertain and report the pecuniary condition of the defendant with the testimony taken before him, and the said Referee having made and certified to the Court his report, to which is annexed all the testimony taken before him, and the other proceedings had before him, and the Court having made in writing its findings of fact and conclusions of law and decision, and the same having been filed and due notice of application for this judgment having been given; now, on motion of Jay & Candler, the plaintiff's attorneys, and after hearing Messrs. Howe & Hummell, the defendant's attorneys, it is

ADJUDGED AND DECREED, and this Court by virtue of the power and authority in it vested, doth adjudge and decree as follows:

First.—That the marriage between the plaintiff, Annette B. W. Wetmore, and the defendant, William B. Wetmore, mentioned in the complaint and in the findings herein, and which took place on or about the 12th day of April, 1882, in the City of New York, be and the same is hereby dissolved and that the said parties be and they are hereby divorced, and the said parties are and each of them is freed from the obligations of the said marriage.

Second.—That there be and hereby is awarded to the said plaintiff the custody and care of the three children of the said marriage mentioned in the said complaint and in the findings of fact, namely, the custody and care of Wenonah Wetmore, born on the 1st day of February, 1883, and of Dagmar Wetmore, born on the 24th day of January, 1887, and of Louis Hoffman Wetmore, born on the 19th day of September, 1889, and all of whom were born before the commencement of this action.

Third.—That the plaintiff be and she hereby is granted liberty to resume her maiden name, and

it shall be and is hereby declared lawful for her to marry again in the same manner as if the said defendant, William B. Wetmore, were actually dead, but it shall not be lawful for the said defendant, William B. Wetmore, to marry again until the plaintiff, Annette B. Wetmore, is actually dead, but nothing herein contained shall prevent the remarriage of the parties to this action, plaintiff and defendant. 49

Fourth.—That the plaintiff shall have and hold all the personal property in her possession or under her control left with her by the defendant, or acquired by her own industry, or given to her by bequest or otherwise. 50

Fifth.—That there be and hereby is granted unto the plaintiff the sum of three thousand dollars annually, so long as she shall live, to be paid by the said defendant in equal quarter-yearly payments of seven hundred and fifty dollars, on the first days of July, October, January and April, in each year, the first of the said payments to be for the period from the date hereof up to the first day of July, 1892, and to be paid on the first day of July, 1892, which said annual sum of three thousand dollars is by the Court considered and deemed a suitable allowance, having regard to the circumstances of the respective parties, for the support of the plaintiff. 51

Sixth.—That there be and hereby is granted to the said plaintiff the sum of one thousand dollars annually for the maintenance and education of the plaintiff's child Wenonah Wetmore, so long as she shall live and until she shall attain the age of twenty-one years; and the further sum of one thousand dollars annually for the maintenance and education of the plaintiff's said child Dagmar Wetmore, so long as she shall live and until she shall attain the age of twenty-one years; and the further sum of one thou-

52 sand dollars annually for the maintenance and education of the plaintiff's said child Louis Hoffman Wetmore so long as he shall live and until he shall attain the age of twenty-one years, such payments to be made by the defendant to the plaintiff quarterly, that is to say, on the first days of each July, October, January and April, the payment first to be made for each of the said children to be for the period from the date hereof up to the first day of July, 1892, and to be the sum of seven hundred and fifty dollars, to be paid on the first day of July, 1892, which said annual sums, amounting together to three thousand dollars, are by the Court considered and deemed a suitable allowance, having
53 regard to the circumstances of the respective parties and the ages and conditions of the said children, for the maintenance and education of the said children.

Seventh—That the defendant, within ten days after service upon him of a certified copy of this judgment, shall give reasonable security for the payment, from time to time of the said sums of money required to be paid by the said defendant for the support of the plaintiff, so long as she shall live, and which said security shall be given by the defendant by his executing, with two sufficient
54 sureties, a bond to the People of the State of New York, in the penal sum of twenty-five thousand dollars, conditioned for the payment to the plaintiff, for her support, so long as she shall live, of the aforesaid sum of three thousand dollars annually, in quarterly payments as aforesaid, and by causing said bond to be approved by a Justice of this Court upon five days' notice to the plaintiff's attorneys, and by filing the said bond with such approval endorsed thereon in the office of the Clerk of the City and County of New York.

Eighth—That the defendant, within ten days after service upon him of a certified copy of this

judgment, shall give such further reasonable security for the payment from time to time of said sums of money required to be paid by the said defendant for the maintenance and education of the said three children respectively, to each of the said children respectively, as long as such child shall live, or until he or she shall attain the age of twenty-one years, and which said security shall be given by the defendant by his executing with two sufficient sureties, a bond to the People of the State of New York, in the penal sum of twenty-five thousand dollars, conditioned for the payment of the aforesaid sum of three thousand dollars annually in equal quarterly payments as aforesaid to the plaintiff, for the maintenance and education of each of the said three children respectively, as aforesaid, and by causing the said bond to be approved by a Justice of this Court upon five days' notice to the plaintiff's attorneys, and by filing the said bond with such approval endorsed thereon in the office of the Clerk of the City and County of New York.

Ninth.—That the plaintiff recover of the defendant the sum of six hundred and sixty-nine 10-100 dollars as and for her costs and disbursements in this action, as adjusted by the Clerk of the Court, and that the plaintiff have execution therefor.

Tenth.—That the plaintiff be at liberty from time to time to apply to the Court for such orders and directions as may be necessary and proper to carry into full effect, and to enforce this judgment and decree.

Eleventh.—That nothing in this judgment contained shall be construed so as to affect the right of the plaintiff to institute such proceedings as may be proper and lawful for enforcing against the defendant or his property any claim that may

58 exist for unpaid temporary alimony under the order of this Court made and entered in this action, and dated at Special Term on the tenth day of December, 1890, up to this date.

Enter.

E. P.,
J. S. C.
WM. J. MCKENNA,
Clerk.

Affidavit of Annette B. Wetmore, read
59 **in opposition to motion.**

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

60

STATE OF NEW YORK, }
County of New York, } ss.:

ANNETTE B. MARKOE, being duly sworn, says that she is the above-named plaintiff, and under her then name of Annette B. W. Wetmore obtained the judgment for divorce in this action dated at Special Term on the 1st day of April, 1892, against the said defendant, William B. Wetmore, a copy of which judgment purports to be annexed to the affidavit made by the said defendant herein, verified on the 18th day of December, 1901, as Schedule C,

but for greater certainty she asks reference to the original of the judgment if need be. 61

Deponent further says that as she is informed and believes on or about the 4th day of November, 1892, a certified copy of the said judgment of divorce was personally served on the defendant, said William B. Wetmore in the City of New York, and that notwithstanding the requirements of the said judgment and notwithstanding the said service of a certified copy of said judgment on the said defendant as aforesaid, he has never voluntarily complied with any of the provisions thereof, that he has never given either of the two bonds for $25,000 each required by the said judgment of divorce and he has never voluntarily, under the said judgment of 62 divorce, paid anything to the plaintiff whatever by way of alimony or for the maintenance and education of the defendant's three infant children, notwithstanding all the said children are still minors under the age of twenty-one years.

DEPONENT FURTHER SAYS, in respect to the proceedings in bankruptcy instituted by the said defendant, William B. Wetmore, and mentioned in his said affidavit, that she never proved any claim in the said bankruptcy proceedings for money due to her for alimony or for the maintenance and education of the said three infant children, and that as deponent has been advised by her counsel 63 said claim for alimony and for the maintenance and education of the said three infant children was not a debt provable in bankruptcy, and that a discharge in bankruptcy would not relieve the said alleged bankrupt, William B. Wetmore, from liability to pay the same.

DEPONENT FURTHER SAYS that the only moneys which she has ever received on account of the alimony and the moneys due for the maintenance and education of the said three infant children under the said judgment of divorce, were certain payments which have been made to her from time

64 to time by the New York Life Insurance and Trust Company and by the Continental Trust Company of the City of New York under and in pursuance of a certain judgment in equity made in an action wherein deponent was plaintiff and Sarah Taylor Wetmore, as Trustee under the Will of Samuel Wetmore, deceased, and the said William B. Wetmore and others, were defendants, the said Sarah Taylor Wetmore being the mother and the said Samuel Wetmore being the father of the said William B. Wetmore, and which judgment required that the net income of a certain trust fund of one hundred thousand dollars should be paid to deponent from time to time when-
65 ever and so long as the said William B. Wetmore should be in default in paying the said alimony and the said moneys awarded for the maintenance and education of the said three infant children as directed to be paid in and by the said judgment of divorce, and that the said equity judgment was subsequently modified so as to limit the annual payments to be made to the plaintiff to the sum of three thousand dollars towards the maintenance and education of the said three infant children, and that the moneys so received under the said judgment from the said trust companies were not sufficient to pay the said alimony and the said moneys
66 so awarded to the plaintiff for the maintenance and education of the said three infant children under the said judgment of divorce, and that after crediting all the moneys received from the said two trust companies as aforesaid there remains due to deponent now under the said judgment of divorce for alimony and for the moneys due for the maintenance and education of the said three infant children, a large sum, which as deponent is informed and believes now exceeds the sum of thirty thousand dollars.

Deponent further says that for a long time before the said defendant, William B. Wetmore, filed his petition in bankruptcy, as mentioned in

his said affidavit, and that at the time of the filing 67
thereof his mother, the said Sarah Taylor Wetmore, was in very delicate and precarious health, and during all that time was a lady of large wealth and the defendant, William B. Wetmore, was her only child, and that after the said William B. Wetmore filed his petition in bankruptcy as aforesaid, and pending his discharge and subsequent to his adjudication in bankruptcy, the said Sarah Taylor Wetmore died at Radnor, Pennsylvania, on or about the 21st day of March, 1899, as deponent is informed and believes, leaving her last will and testament, in and by which, after directing the payment of her debts and funerel expenses, she gave, devised and be- 68
queathed all the rest, residue and remainder of her estate, real, personal and mixed, to her son, the said defendant William B. Wetmore, and in and by the said will appointed him the executor thereof, and that under the said will, as deponent is informed and believes, the said defendant became possessed of a large property and estate, and that as appears by a copy of the proceedings in bankruptcy in the possession of her attorneys and as she is informed and believes, the only person named in the said proceedings in bankruptcy by the said William B. Wetmore as creditors were his said mother and deponent, as more fully appears by the annexed affi- 69
davit of Flamen B. Candler, one of deponent's attorneys herein, to which reference is hereby made.

ANNETTE B. MARKOE.

Sworn to before me this 23d day of December, 1901.

JOHN H. BOGARDUS,
Notary Public,
Kings County.

Certificate filed in New York County

70 **Affidavit of Flamen B. Candler, read in opposition to motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff,

against

71 WILLIAM B. WETMORE,
Defendant.

STATE OF NEW YORK, }
County of New York, } ss.:

FLAMEN B. CANDLER, being duly sworn, says, he is now and has been ever since the commencement of this action, which was begun by the personal service upon the defendant of the summons and a copy of the complaint on the 12th day of June, 1890, one of the attorneys and counsel for the plaintiff in the above-entitled action.

72 Deponent further says that in answer to that part of the affidavit of the defendant, William B. Wetmore, made and verified in this action on the 18th day of December, 1901, wherein he deposes that the plaintiff appeared in his bankruptcy proceedings and filed specifications in opposition to the same, and after his discharge had been granted, appealed from the order granting the discharge in bankruptcy, that no claim in the said bankruptcy proceedings based upon the judgment for divorce made in this action dated at Special Term on the 1st day of April, 1892, for alimony or for moneys due to the plaintiff for support of her three infant

children, was made, and that no other proof of claim in the said bankruptcy proceedings was made on behalf of the plaintiff except proof of claim for the value of certain personal property belonging to the plaintiff which the defendant had converted unlawfully to his use, and which proof of claim in respect thereto is as follows: 73

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN BANKRUPTCY.

74

In the Matter of WILLIAM B. WETMORE, Bankrupt.	In Bankruptcy.

At the Borough of Manhattan, in the City, County and State of New York, in the Southern District of New York, on the sixth day of February, A. D. 1899, came Annette B. Markoe, of the said Borough of Manhattan, in the City of New York, in the County and State of New York, in the said 75 Southern District of New York, and made oath and says that William B. Wetmore, the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said deponent in the sum of four thousand dollars; that the consideration of the said debt is as follows: Heretofore and prior to the month of April, 1889, deponent was the owner and in possession of divers goods, chattels, credits, and personal property consisting of—

76 White laces,
Black laces,
1 Lace fan,
1 Lace handkerchief,
1 Point lace fan,
1 Lace Duchesse fan,
1 Pair vases,
2 Worcester vases,
1 Pair brass candelabra,
1 Small picture—water color,
Gilt Chaise lounge covered with blue silk,
2 Gilt arm chairs,
1 Mahogany writing desk,
1 Corner Marquetiere cabinet,
77 1 Mahogany buffet,
Leather screen,
Carved oak chairs,
White enameled cheval glass,
White screen,
1 Mahogany dressing table,
1 Mahogany writing desk,
1 Small mahogany table,
1 White screen,
1 Carved oak table,
1 Old gilt Mirror,
1 Tall mahogany clock,
2 Large medallion vases,
78 1 Sun inkstand,
Table cover and sofa cushions,
1 Dozen blue bordered plates,
1 Dozen Worcester plates,
1 Large engraving,
4 or 5 palms,
1 Pair of ponies,
1 Buckboard,
1 Set of harness,
1 Brougham,
1 Russian kettle.

That prior to the 27th day of April, 1889, and on that day and subsequently and without the knowledge or consent of deponent, the said William B.

Wetmore from time to time obtained the possession of all the said articles of personal property and converted the same to his use, and he has never paid deponent for the same, or for any part thereof, and he is now indebted to deponent for the value of the said articles of personal property, which exceeds the sum of four thousand dollars with interest from the month of of May, 1889; that no part of the said debt has been paid; that there are no offsets or counterclaims to the same; and that deponent has not nor has any person for her order or to her knowledge or belief for her use had or received any manner of security for said debt whatever. 79

ANNETTE B. MARKOE,
Creditor. 80

Subscribed and sworn to before me this 6th day of February, A. D. 1899.

WILLIAM WHITE WHITTAKER,
[L. S.] Notary Public,
Kings County,

Cert. filed in N. Y Co.

Deponent further says in respect to that part of the said affidavit of the said William B. Wetmore contained in the fourth subdivision thereof which refers to the amount alleged to be due to the plaintiff under the provisions of the said divorce judgment, being the sum of $17,399.37, on the 28th day of December, 1898, and the sum of $19,221.60 on the 13th day of January, 1899, that the said sum of $17,399.37 was the amount stated in the schedules filed by the said William B. Wetmore in the bankruptcy proceedings which he claimed was due to the plaintiff in this action for alimony under the said judgment of divorce, but that the said plaintiff did not claim that the said sum of $17,399.37 was due for alimony but did claim that 81

82 the amount which was due on the said 28th day of December, 1898, under the said judgment of divorce, was in part for alimony and in part for the maintenance and education of the defendant's three infant children mentioned in the said judgment of divorce.

Deponent further says that in the defendant's said petition for bankruptcy he mentioned but two creditors, namely, the plaintiff herein and his mother, Sarah T. Wetmore, and that the said plaintiff is mentioned twice, first in schedule A, number 2, being the schedule relating to creditors holding securities, namely: "Name of creditor, An-
"nette B. Markoe, wife of Dr. James Wright
83 "Markoe; amount of debt claimed by the creditor, "$17,399.37," and secondly in Schedule A, number 3, being the schedule of creditors whose claims are unsecured: Annette B. Markoe, wife of Dr. James Wright Markoe, amount unknown, claim for personal property alleged to belong to her, the claimed ownership of which petitioner disputes (and that is the claim which was proved by the plaintiff in bankruptcy, as herein above set forth), and the said defendant's said mother, Sarah T. Wetmore, who is mentioned in said Schedule A, number 3, of unsecured creditors, as Sarah T. Wetmore, amount $57,073.46 for moneys loaned and advanced, and
84 moneys had and received.

Deponent further says that in respect to the allegations contained in the said affidavit of the said defendant in the fifth subdivision thereof to the effect that the said amount due under the said judgment of divorce to the said plaintiff on the 13th day of January, 1899, was a provable debt under the bankruptcy act in that it was a fixed liability, as evidenced by the judgment and was not within one of the excepted cases specified in said act, that at the time the said bankruptcy proceedings were pending the said plaintiff refrained from proving the said amounts which were due to her for arrears of alimony and for support,

maintenance and education of the children under the said divorce judgment under advice of deponent who advised the said plaintiff that the said claims were not provable debts under the said bankruptcy act, and that a discharge in the said bankruptcy proceedings would not relieve or discharge the said defendant from making the payments under the said judgment for divorce which were then due and payable or which might subsequently become due and payable, and the said plaintiff now claims and insists that the said discharge in bankruptcy does not in any manner affect her claim under the said judgment of divorce or bar her right to recover any amounts which were due at the date of the filing of the said petition in bankruptcy for the defendant's discharge from his debts, or which have subsequently accrued. 85 86

DEPONENT FURTHER SAYS that as appears from an affidavit and other papers in his possession a certified copy of the said judgment of divorce was served upon the said defendant in the City of New York on the 4th day of November, 1892, and that notwithstanding such service the said defendant has never given either of the two bonds required by the said judgment or voluntarily paid any sum whatever by way of alimony or for the support and education of his three infant children as directed in and by the said judgment of divorce, and deponent also states upon information and belief that the said defendant has disregarded that part of the said judgment of divorce which provided that during the life of the plaintiff he should not marry, but that in violation thereof shortly after the said judgment of divorce was entered, the said defendant did marry a woman, who, as deponent is informed and believes, now lives with him as his wife. 87

DEPONENT FURTHER SAYS, that, owing to the failure of said defendant to comply with the provisions of the said judgment of divorce as aforesaid,

88 the said plaintiff instituted a certain action in the Supreme Court of the State of New York against the said defendant and against his mother, as trustee of his father's will, and others, and that said action resulted in the judgment made on the 30th day of April, 1894, which in substance directed that the income from a certain trust fund referred to in the will of the said defendants (William B. Wetmore's) father for his benefit, should be paid to the said plaintiff whenever he, the said defendant, should be in default in making the payments under the said judgment of divorce, and which judgment was subsequently modified so as to limit the amount to be paid to the plaintiff to
89 the sum of three thousand dollars per annum on account of the moneys awarded in and by the said judgment of divorce for the maintenance and education of the three children, and that the only moneys which the plaintiff has ever received since the said judgment of divorce was granted on account of the said alimony or moneys for the support and education of the children were those which have been received under the said judgment in the said last mentioned action.

DEPONENT FURTHER SAYS, that he verily believes that the relief asked for upon the present application was asked for in substance upon a motion here-
90 tofore made in this action by the said defendant at a Special Term of this Court at which Honorable Francis M. Scott, Justice, presided. and which application was denied by an order dated at Special Term on the 30th day of April, 1901, a copy of which said order is hereunto annexed and marked Exhibit A, and that a copy of said order with notice of entry and filing thereof was duly served on the defendant's attorneys on the 2d day of May, 1901, and the said order has never been modified, and that no appeal therefrom has ever been taken, and that the said order has become final.

Deponent further says that on the said last mentioned application which resulted in the said order

of the 30th day of April, 1901, the said defendant 91
in his affidavit read in support of his said motion which resulted in that order, deposed amongst other things as follows:

"Since the said adjudication in bankruptcy I have become through the death of my mother and under the provisions of her will of sufficient means to discharge the arrears of alimony which are claimed to be due and owing to the plaintiff, and I am ready and hereby offer and stand ready to pay the amount which has accrued and is payable whether before or subsequent to my adjudication in bankruptcy, providing only that the question as to what may be due and owing shall be finally determined by a proper tribunal, which I am advised is the United States Supreme Court, and that 92
the question can and will be brought before that Court for final determination; and until such final determination it cannot authoritatively be declared whether under the present Bankruptcy Act a discharge in bankruptcy does or does not discharge arrears of alimony."

And deponent further says that in his opinion there is no foundation for the defendant's suggestion or intimation which was made in a previous application, of which said application the present one is substantially a renewal, that in this action he can obtain any adjudication by the United States Supreme Court as to the effect of the said discharge in bankruptcy on the claims of the 93
plaintiff under the judgment of divorce herein, and that inasmuch as the said defendant appears to be in contempt of this Court and is abundantly able to comply with the requirements of the judgment of divorce herein, and inasmuch as this Court at Special Term and the Appellate Division of this Court in this Department has passed upon the insufficiency of a discharge in bankruptcy to relieve a defendant in a divorce suit from the payment of arrears of alimony, deponent submits that this application should be denied and the plaintiff should

94 be left to all the remedies open to her for the enforcement of her judgment of divorce in this action.

FLAMEN B. CANDLER.

Sworn to before me this 23d day of December, 1901.

JOHN H. BOGARDUS,
Notary Public,
Kings County.

Certificate filed in New York County.

95

96

Exhibit A, annexed to affidavit of Flamen B. Candler, and being order of Mr. Justice Scott of April 30, 1901, read in opposition to motion. 97

Exhibit A.

At a Special Term, Part I of the Supreme Court of the State of New York, held at the County Court House in the County of New York, on the 30th day of April, 1901.

Present—Hon. FRANCIS M. SCOTT, Justice. 98

ANNETTE B. WETMORE (now Annette B. Markoe),
Plaintiff,
against
SARAH TAYLOR WETMORE, individually and as Trustee under the last Will and Testament of Samuel Wetmore, deceased, of the trust created for the benefit of WILLIAM BOERUM WETMORE, WILLIAM B. WETMORE and others,
Defendants.

Sequestration Action.

99

ANNETTE B. W. WETMORE,
Plaintiff,
against
WILLIAM BOERUM WETMORE,
Defendant.

Divorce Action.

A motion having been made in the above-entitled actions by the defendant, William B. Wetmore, for an order:

100 "1. That the accounts between the plaintiff and the defendant, William Boerum Wetmore, shall be separated and stated so as to show as follows: (*a*) The items received and expended subsequent to the decree in the divorce action, and prior to the commencement of the sequestration action, so as to show the balance due pursuant to the judgment of divorce at the time of the commencement of the sequestration action. (*b*) The items, commencing with the balance due at the time of the appointment of the receiver in the sequestration action, carried down to the 13th of January, 1899, when the said William Boerum Wetmore was adjudicated a bankrupt, and showing the amount involved
101 in the question as to whether the discharge in bankruptcy relieved the said bankrupt from any part of his obligation to the plaintiff. (*c*) The amount received and disbursed since the 13th of January, 1899, until the 1st of February, 1901, including the reduction in alimony, pursuant to the order of Mr. Justice Scott of the 26th of June, 1899, and showing the amount due to the plaintiff by the said defendant, Wetmore, on the 1st of February, 1901, or until the hearing and determination of this motion, as this honorable Court may elect and deem proper.

2. That the defendant, William B. Wetmore, shall
102 be permitted to give a good and sufficient bond by some responsible surety company, to be approved by this Court, and, and running to the plaintiff in this action, to pay to her so long as he shall live the sum of $1,000 per annum for the benefit of each of the children of the said William B. Wetmore, namely, Wenonah, Dagmar and Louis Hoffman, until they shall attain the age of twenty-one years respectively, provided they and each of them shall live to reach that age, and that said bond shall be taken in lieu of and in compliance with the provisions of the judgment in the said divorce action providing therefor.

3. That the defendant, William B. Wetmore, shall be permitted to pay into Court or deposit in any trust company selected by this Court the amount of money found due by him to the plaintiff herein and unpaid on the 13th day of January, 1899, to be held subject to the final determination of this Court as to the effect of the discharge of the said Wetmore of his debts, and the final determination as to whether or not the arrears of alimony on the 13th of January, 1899, were discharged by the decree or order made on the 21st day of June, 1900, in the District Court of the United States for the Eastern District of Pennsylvania in Bankruptcy, and involved in the appeal now pending before the United States Circuit Court of Appeals for the Eastern District of Pennsylvania. 103 104

4. That upon the payment into Court or deposit as aforesaid of the money found to be due on the 13th day of January, 1899, from the said William B. Wetmore to the plaintiffabove-named, and upon the payment in cash to the said plaintiff of any amount or amounts, if any, found due to her from the said defendant or defendants subsequent to the adjudication in bankruptcy aforesaid and upon the approval and filing of the bond above mentioned, together with any costs and charges, if any, which shall be ascertained and found due to the receiver appointed and acting in the sequestration action, the said judgment in the sequestration action shall be annulled and satisfied and the receiver discharged, and the securities tied up by reason thereof released from further liens by reason of the commencement of said action or by reason of any order or judgment or decree afterwards entered therein. 105

5. And upon such compliance with the order of this Court as moved for herein that the defendant, William B. Wetmore, shall be relieved and discharged of and from any other or further compliance with the judgment in the above-entitled divorce action and also of and from any contempt

106 or alleged contempt, if any, on his part heretofore involved or charged or alleged in any of the orders or proceedings in the above-entitled sequestration action.

6. And that the defendant, William B. Wetmore, shall have such other and further relief in the premises as shall be just and proper."

On reading and filing the notice of motion for the said order, dated New York, February 27th, 1901, and the affidavits thereto annexed, namely, an affidavit made by William B. Wetmore, verified on the 28th day of January, 1901, and Exhibits A, B, C, D, E, F, G, H, J, K, L, M, N and O,
107 thereto annexed, and an affidavit made by Thomas P. Wickes, Esq., verified on the 28th day of February, 1901, and an affidavit of Thomas L. Greene, verified on the 27th day of February, 1901, and the statements and accounts of the Audit Company of New York thereto annexed as Exhibits A, B (1), B (2), C (1) and C (2), all on the part of the said defendant, William B. Wetmore, in support of the said motion, and on reading and filing the affidavit of Flamen B. Candler, verified on the 14th day of March, 1901, and on reading the judgment rolls in the two above-entitled actions heretofore duly filed, all on behalf of the plaintiff and in opposition to the said motion, and after hearing Thomas P.
108 Wickes, Esq., of counsel for the defendant, William B. Wetmore, in support of the said motion and Flamen B. Candler, of counsel for the plaintiff in opposition thereto, and after due deliberation and on motion of Jay & Candler, the attorneys for the plaintiff,

Ordered, that the said motion be and the same is hereby denied with ten dollars costs to be paid by the defendant William B. Wetmore to the plaintiff.

Ent.
F. M. S.

[SEAL.]

(10c. I. T. R. S.) A copy,
WM. SOHMER, Clerk.

Messrs. HATCH & WICKES, 109
Attorneys for defendant William B. Wetmore.

Sirs.—Please take notice that the within is a copy of an order duly made and entered in the within entitled action and this day duly filed in the office of the clerk of the county of New York at the County Court House in the County of New York.

Dated New York May 1, 1901.

Yours, etc.,

JAY & CANDLER,
Attorneys for Plaintiff,
48 Wall street, New York. 110

Summons.

SUPREME COURT OF THE STATE OF NEW YORK.

ANNETTE W. B. WETMORE,
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

Trial desired in the City and County of New York.

Summons. 111

This is an action for a divorce.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against

112 you by default, for the relief demanded in the complaint.

Dated May 27, 1890.

JAY & CANDLER,
Plaintiff's Attorneys.
Office and Post Office Address,
No. 48 Wall St.,
New York.

Complaint.

NEW YORK SUPREME COURT.

113

ANNETTE B. W. WETMORE,
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

Trial desired in the City and County of New York.

The plaintiff, Annette B. W. Wetmore, appearing herein by Jay & Candler, her attorneys, respectfully shows to this Court as follows:

114 I.—That on the 12th day of April, 1882, at Grace Church, in the city of New York, in the State of New York, this plaintiff intermarried with the defendant.

II.—That the marriage ceremony between the plaintiff and defendant was performed at the date and place aforesaid by the Reverend Henry C. Potter, Doctor of Divinity, who was then the rector of Grace Church above mentioned, according to the rites of the Protestant Episcopal Church in the United States and according to the laws of the State of New York, and thereupon the plaintiff be-

came, has been ever since, and is now, the wife of the defendant. 115

III.—That the plaintiff and the defendant were at the time of the commission of the several acts of adultery hereinafter mentioned, and they now are residents of the State of New York and severally dwell therein.

IV.—And the plaintiff further says upon information and belief, that on Saturday, the 23rd day of March, 1889, at a certain house of prostitution known as No. 14 West 24th Street in the City of New York, the defendant committed adultery with a woman whose name is to the plaintiff unknown. 116

V.—And further, upon information and belief, that a few days thereafter and on Wednesday, the 3rd day of April, 1889, and on the night between that day and Thursday, the 4th day of April, 1889, at the said house known as No. 14 West 24th street in the said City of New York, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

VI.—And further, upon information and belief, that a few days thereafter and on Monday, the 8th day of April, 1889, and in the night between that day and Tuesday the 9th day of April, 1889, at the said house known as No. 14 West 24th street in the said City of New York, the defendant again committed adultery with a woman whose name is to the plaintiff unknown. 117

VII.—And further, upon information and belief, that a few days thereafter and on Saturday, the 13th day of April, 1889, at the said house known as No. 14 West 24th street in the said City of New York, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

118 VIII.—And further, upon information and belief, that a few days thereafter and on Tuesday, the 23d day of April, 1889, and on the night between that day and Wednesday, the 24th day of April, 1889, at the said house known as No. 14 West Twenty-fourth street, in the said city of New York, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

IX.—And further, upon information and belief, that on Sunday, the 9th day of March, 1890, and on the night between that day and Monday, the 10th day of March, 1890, at a house of assignation in the city of Denver, in the State of Colorado,
119 the said house being situated on the southeast corner of Market and Twenty-second streets in the said city of Denver, the defendant committed adultery with a woman whose name is Bertha Henderson.

X.—And further, upon information and belief, that a few days subsequently thereto and on Wednesday, the 12th day of March, 1890, and on the night between that day and Thursday, the 13th day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson.

120 XI.—And further, upon information and belief, that a few days subsequently thereto and on Saturday, the 15th day of March, 1890, and on the night between that day and Sunday, the 16th day of March, 1890, the defendant again committed adultery at the house aforesaid with the said Bertha Henderson.

XII.—And further, upon information and belief, that a few days subsequently thereto and on Tuesday, the 18th day of March, 1890, and on the night between that day and Wednesday, the 19th day of March, 1890, the defendant again committed

adultery at the house aforesaid in Denver with the said Bertha Henderson. 121

XIII.—And further, upon information and belief, that a few days subsequently thereto and on Thursday, the 20th day of March, 1890, and on the night between that day and Friday, the 21st day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson.

XIV.—And further, upon information and belief, that a few days subsequently thereto and on Saturday, the 22d day of March, 1890, and on the night between that day and Sunday, the 23d day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson. 122

XV.—And further, upon information and belief, that a few days subsequently thereto and on Monday, the 24th day of March, 1890, and on the night between that day and Tuesday, the 25th day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson.

XVI.—And further, upon information and belief, that on the 20th day of May, 1890, and on the night between that day and the 21st day of May, 1890, at the above-mentioned house in the city of New York, known as No. 14 West 24th street, in said city, the defendant again committed adultery with a woman whose name is to the plaintiff unknown. 123

XVII.—And, further, upon information and belief, that on the 22d day of May, 1890, and on the night between that day and the 23d day of May, 1890, at the above-mentioned house in the City of New York, known as No. 14 West 24th street, in said city, the defendant again committed adultery

124 with a woman whose name is to the plaintiff unknown.

XVIII.—And, further, upon information and belief, that on the 24th day of May, 1890, and on the night between that day and the 25th day of May, 1890, at the above-mentioned house in the City of New York, known as No. 14 West 24th street, in said city, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

XIX.—That the aforesaid acts of adultery were committed by the defendant without the consent,
125 connivance, privity or procurement of the plaintiff. That five years have not elapsed since the plaintiff discovered the facts of such adultery. That the plaintiff has not cohabited with the said defendant since the commission of the acts of adultery above mentioned, or any of them.

XX.—That there is no judgment or decree in any Court of the State of New York or of any Court whatsoever against the plaintiff in favor of the defendant for a divorce on the ground of adultery or otherwise.

XXI.—That there had been three children born
126 of the marriage of the plaintiff and the defendant, namely: a daughter, Wenona, born on the 1st day of February, 1883; a daughter, Dagmar, born on the 24th day of January, 1887, and a son (not yet named), born on the 19th day of September, 1889.

XXII.—That the plaintiff was ignorant of the commission of any acts of adultery on the part of the defendant at any time until on or about the 15th day of March, 1889, and that she has not cohabited with the defendant since the day she first became aware of the fact that the defendant had committed adultery.

XXIII.—That the defendant is addicted to the excessive use of intoxicating drink, and when under the influence thereof is violent in his behaviour, and has on many occasions behaved in a violent and abusive manner to the plaintiff and to his two elder children above mentioned, and has frequently laid violent hands on the plaintiff and upon their child Wenona aforesaid; that he is a man wholly devoid of religious principles or belief, and during the time that plaintiff and her children lived with him never permitted her to have either of her children baptised, and always refused her permission to have them so baptised, notwithstanding her frequent and earnest requests to be permitted to do so, and that said children were never baptised until after the plaintiff had ceased to live with the defendant as aforesaid; that during the time that plaintiff and her children lived with the defendant he hindered greatly her efforts to instruct said children in the principles of the Christian religion, and on many occasions declared that he would not permit them to be so educated, nor be taught to believe in the existence of God, nor would permit them to say their prayers when he could prevent it; that during the time that plaintiff lived and cohabited with the defendant as aforesaid and when under the influence of drink he frequently assaulted the plaintiff in the presence of her children and the servants and others with violent, filthy and abusive language, and that as plaintiff is advised and believes by reason of his character and habits as aforesaid, he is entirely unfit to have the care and custody of his children or to have any access to or control over them whatsoever. 127 128 129

XXIV.—That the defendant is a man of thirty-eight years of age or thereabouts, in good health, and that he is an only child. That his father is dead and that his mother is still living. That the

130 defendant is possessed of a large fortune in his own right besides a large amount of property held in trust for him under the will of his late father, and that as plaintiff is informed and believes the income to which he is entitled amounts to the annual sum of between fifteen and eighteen thousand dollars or thereabouts. That the defendant's *mother is a woman of large wealth and is entitled*, as plaintiff is informed and believes, to property which produces an annual income of $20,000 or thereabouts, and that she is in the habit of giving, from time to time, large sums of money and other valuable presents to the defendant. The
131 plaintiff further states that she is possessed of but scanty means of her own, and, that unless the defendant shall continue to support her and her said children, such means as she has will soon be entirely exhausted.

WHEREFORE, the plaintiff demands judgment that the bonds of matrimony between herself and the defendant be dissolved and for an absolute divorce from the defendant; and the plaintiff further prays that the custody and care of the said children be awarded to the plaintiff, and that reasonable provision for the support and maintenance of the plaintiff and of her said children and for their education may be made out of the defendant's
132 property, and for the costs of this action. And the plaintiff further prays that the defendant be directed to pay to her, pending this action, such reasonable sum for the support of herself and the aforesaid children, and to enable her to maintain this action as to the Court shall seem just, and that she may have such other and further relief as may be just, equitable and proper, together with the costs of this action.

JAY & CANDLER,
Plaintiff's Attorneys.

City and County of New York, ss.: 133

ANNETTE B. W. WETMORE being duly sworn, deposes and says that she is the plaintiff in the above-entitled action. That she has read the foregoing complaint and knows the contents thereof, and that the same is true to her own knowledge, *except as to the matters* therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

ANNETTE B. W. WETMORE.

Sworn to before me this
27th day of May, 1890.

WILLIAM E. RUDISCHHAUSER, 134
Notary Public (47),
N. Y. Co.

Affidavit of Service of Summons and Complaint.

City and County of New York, ss:

JAMES L. MOORE, being duly sworn says: That he is the age of thirty-two years and resides at No. 65 Reid avenue, in the City of Brooklyn, County of Kings, in the State of New York. That on the 135
12th day of June, 1890, on the road leading from the railroad depot of the West Shore Railroad at West Point, in the County of Orange in the State of New York, he served the summons and a copy of the complaint in this action, of which summons and complaint the foregoing is a true copy on the defendant therein mentioned, William B. Wetmore, by then and there delivering to and leaving with the said defendant. William B. Wetmore, in person, the said summons and a copy of the said complaint.

DEPONENT FURTHER says that at the time, and shortly before the said service, Mrs. Wetmore, the

mother of the said defendant, William B. Wetmore, resided at No. 15 Waverly Place in the City of New York, where the defendant was in the habit of visiting or calling from time to time, and that some short time before the said 12th day of June, 1890, the said defendant was pointed out to deponent by Charles Discher, a detective, who resides in the City of Brooklyn, as the said William B. Wetmore, who was leaving his mother's said residence, No. 15 Waverly Place, and that frequently thereafter deponent, at various places in the City of New York saw the said William B. Wetmore so that he became entirely familiar with his appearance and became to know him perfectly, by sight, and during that time deponent ascertained that the said defendant was generally addressed as Major Wetmore, and on the occasion when deponent served the said summons and a copy of the complaint on the said defendant before he handed the same to him he addressed the said defendant and asked him if he was Major Wetmore, and he replied that he was, whereupon deponent made the service as hereinabove set forth.

J. L. Moore.

Sworn to before me this 29th day of March, 1892.

Robert W. Candler,
Notary Public,
Kings County.

Certificate filed in New York County.

Answer.

N. Y. SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

ANNETTE B. W. WETMORE

vs.

WILLIAM B. WETMORE.

The defendant answers to the complaint as follows:

First.—He admits the First, Second, Twentieth and Twenty-first Articles of the said complaint, and he denies each and every other allegation in the said complaint contained.

Second.—For a further and separate defense the defendant answers:

That prior to the first day of March, 1889, the plaintiff, without cause, and in violation of the duty assumed by her under her marriage contract with this defendant, refused, and she has ever since that time continued to refuse, to live with this defendant as his wife, or to accord to this defendant the rights of husband.

That at the time of such refusal, and prior to the 23rd day of March, 1889, the plaintiff expressly proposed and consented that in lieu of the performance on her part of the duty of a wife, this defendant should enter into illicit and adulterous relations with other women, and that each and every act of adultery committed by this defendant since his marriage with the plaintiff, was committed by the procurement and with the connivance of the plaintiff.

Third.—The defendant further says that on or

142 about the 17th of April, 1889, the plaintiff, without cause, deserted the defendant, and left his house, taking with her both defendant's children then living, and has ever since refused to return or restore to defendant the custody of his said children, or either of them.

That the only avowed or pretended reason for such action on the part of the plaintiff was the domestic discord which the plaintiff unjustly and without any foundation in fact charged to have been caused by intemperance on the part of this defendant, but which was in fact produced by the plaintiff's unwifely conduct, the alienation of her affections from this defendant, and her unwilling-
143 ness to perform the duties of a wife, and to become the mother of the defendant's children.

That until the commencement of this action no other charge or pretense of any charge against this defendant was ever made by or on behalf of the plaintiff, except the said charge of intemperance.

That so solicitous was the defendant to procure the return of the plaintiff and his children to his home, that notwithstanding the falsity of the charge of intemperance against him, and notwithstanding the fact that his use of alcoholic stimulants was not excessive, and was only such as is usual among gentlemen in the city of New
144 York, and notwithstanding the fact that defendant's use of alcoholic stimulants in no way exceeded that which the plaintiff well knew to be his custom and practice at the time she married the defendant, defendant voluntarily offered, if the plaintiff would return to his home with defendant's children, to refrain entirely from the use of alcoholic stimulants, and he has accordingly refrained entirely therefrom, as the plaintiff well knows, ever since the 3d day of May, 1889 and since that time has taken no alcoholic stimulants whatever.

That in answer to the defendant's repeated efforts to procure the return of his wife and children, it was proposed on the part of the plaintiff that a

year's probation in respect of the use of alcoholic stimulants should be allowed, and this defendant consented to such period of probation and consented during said period to support the plaintiff and their children without their, in the meantime, returning to his home. 145

That thereupon and in pursuance of such arrangement an agreement was entered into contained in the letters marked A, B, C, D. E, F, which are annexed hereto as part of this answer.

That at the time of said arrangement and agreement, the plaintiff renewed her consent that the defendant should during the said period of probation, in lieu of the performance of the duty of a wife on her part, enter into illicit relations with other women. 146

That as this defendant is informed and believes, immediately upon the completion of said arrangement, the plaintiff employed detectives and commenced a system of espionage upon this defendant, for the purpose of obtaining evidence upon which to base this action, and this defendant charges the fact to be that said agreement was made and said consent was given for the purpose of deceiving and misleading this defendant and procuring him to enter into such relations as to lay a foundation for this action.

That in the month of May, 1890, the plaintiff, having as she supposed procured such evidence, and accomplished the object of said agreement, herself violated the agreement, and forthwith commenced this action, then for the first time charging this defendant with infidelity, although according to her own statement she had known defendant to be unfaithful at the time of making such agreement, and for more than a year prior to her breaking said agreement, and commencing this action. 147

148 **Wherefore the defendant demands judgment that the complaint herein be dismissed with costs.**

Dated New York, July 18th, 1890.

FRANKLIN & CLIFFORD A. H. BARTLETT,
Attorneys for Defendant,
32 Times Building,
New York City.

A.

William Jay. **Flamen B. Candler.**

149 **JAY & CANDLER,**
Counsellors at Law,
48 Wall Street, New York.

December 7th, 1889.

FRANKLIN BARTLETT, Esq.,

My Dear Sir.—I have seen Mrs. Wetmore and she tells me that her husband has paid her several visits and has given her a small sum of money—three hundred dollars; that he has also returned to her the jacket and cloak. He has, however, made no definite proposition for her immediate future. It is hardly necessary for me to remind you that Mrs. Wetmore's ideas as to money are
150 not extravagant; that she only wants enough to insure her comfortable support and an assurance that she will be permitted to live alone, at any rate for the present. I cannot consent to advise her to wait longer for a proposition from Major Wetmore. I think she has waited long enough. I have advised her therefore to state her reasonable demands, which are as follows:

She desires an income of $5,000 per annum, the amount heretofore substantially agreed to by Major Wetmore. She wants to be permitted to live alone with her children for a period sufficiently long to give her assurance that her husband has reformed

his habits to an extent that will make it safe for 151
her to return to him, and she requires a pledge on the part of her husband that he will abstain absolutely from all intoxicating drinks.

If Major Wetmore is not willing to agree to these most reasonable demands, there will be nothing left but to resort to legal proceedings. So far as I know there is no reason why Major Wetmore should decline to agree to any of the terms proposed by his wife. The whole matter of a reconciliation is left indefinite and such reconciliation may be accomplished as soon as it is evident that the needed reform has taken place.

Please submit these views to Major Wetmore and let me hear from you at your early convenience, as Mrs. Wetmore is desirous of knowing what she may have to depend upon in making her plans for the winter. 152

I remain,

Yours very truly,

WILLIAM JAY.

B.

WILLIAM JAY. FLAMEN B. CANDLER.

JAY & CANDLER, 153
Counsellors at Law,
48 Wall Street, New York.

December 17th, 1889.

FRANKLIN BARTLETT, Esq.,
168 Nassau street, City.

My Dear Sir.—I saw Mrs. Wetmore this morning and she has substantially agreed to the proposition contained in your longer letter of December 13th. The only part to which she does not altogether agree is the provision that the children are to be sent to visit Major Wetmore at least once in

ten days at his then residence, wherever it may be in the city of New York. The reason why Mrs. Wetmore objects to this provision in its present form is not that she is unwilling that the children should visit their father and grandmother, on the contrary, she is willing that they should see their father and grandmother at frequent intervals. As long as she lives at Richmond Hill, however, and especially during the winter months, a journey to town for the two children, especially for Dagmar, is accompanied with a certain amount of risk to their health and should not be undertaken more frequently than is absolutely necessary. The cars composing the trains between Richmond Hill and Long Island City are dirty and ill-ventilated and the same may be said of the horse cars which the children would have to take in order to reach their grandmother's residence or whatever other house Major Wetmore might be occupying for the time being. Mrs. Wetmore desires me to say that when the Spring opens and the weather is pleasant she has no objection at all to bringing or sending the children to their father and grandmother, but that during the winter months, in the bad weather, she cannot consent to do so at the regular intervals stipulated for in your letter above referred to. Mrs. Wetmore desires me to state very clearly that in making this objection to your proposition she was actuated by no desire to prevent the children from seeing their father and their grandmother, but was guided solely by a desire to guard their health. I am sure you will recognize the reasonableness of her position and that Major Wetmore will consent to a modification of the stipulation as suggested.

Hoping to hear from you at your early convenience, so that we may adjust this matter as speedily as may be, I remain,

Very sincerely yours,

WILLIAM JAY.

C.

157

WILLIAM JAY. FLAMEN B. CANDLER.

JAY & CANDLER,
Counsellors at Law,
48 Wall Street, New York.

December 18th, 1889.

FRANKLIN BARTLETT, Esq.,
168 Nassau Street, City.

Dear Sir.—I am very sorry to learn from your letter of this date that Major Wetmore imposed a fresh condition in lieu of the one which became impossible of fulfillment by reason of the danger 158
to the children's health. I know that there is no use in submitting the present proposition to Mrs. Wetmore. She would not consent to separate herself from her children in the manner contemplated even for a week. I shall be greatly disappointed if the negotiation falls through when we had substantially agreed upon all vital points I knew that Major Wetmore would not insist upon bringing the children to town in bad weather, but I did not imagine that he would substitute for it a condition equally difficult of performance. I sincerely trust that you will endeavor to persuade him to withdraw from this last position, and let the arrangement go into effect on the basis of your pre- 159
vious letter, with the slight modification suggested in mine of yesterday. You of course understand that Major Wetmore visits his children in Richmond Hill whenever he sees fit.

Hoping that this matter may now be arranged, I remain

Very sincerely yours,
WILLIAM JAY.

160 **D.**

Law Offices,
168 Nassau St.
New York.

FRANKLIN & CLIFFORD A. H. BARTLETT:

Dec. 19th, 1889.

Col. WILLIAM JAY:

Dear Sir.—In answer to your letter of December 18th, we beg to state that in furtherance of harmony, while Major Wetmore concedes no legal right to the position taken by Mrs. Wetmore in regard to the children, he will not insist upon the
161 one weeks visit, but will continue to see the children at Richmond Hill, until the spring when they must be sent to see him in town as promised in your former note.

The first payment of money will be made on the 26th day of December, 1889, and will be the first monthly payment. Of course, Mrs. Wetmore must furnish each month an accurate statement of her disbursements paid out of Major Wetmore's money for herself and children.

Yours very sincerely,
FRANKLIN BARTLETT.

162 ———

E.

William Jay. Flamen B. Candler.

JAY & CANDLER,
Counsellors at Law,
48 Wall Street, New York.

December 23d, 1889.

FRANKLIN BARTLETT, Esq.,
168 Nassau Street, City.

My Dear Sir.—You last letter to me, dated 19th

inst. has been submitted to Mrs. Wetmore and she 163
acquiesces in the provision that she shall furnish each month an accurate statement of her disbursements paid out of Major Wetmore's money for herself and children. It seems, therefore, that we are agreed upon all points.

The understanding may be briefly expressed as follows :

Major Wetmore agrees to pay his wife the sum of $5,000 for one year from say the present time, in monthly payments, the first payment to be made on the 26th inst., Mrs. Wetmore during the time to be at liberty to live apart from her husband with her children ; Major Wetmore to be at 164
liberty to visit his children, wherever they may be, at reasonable hours.

Mrs. Wetmore, as soon as the weather is sufficiently settled next spring, to allow of her doing so without detriment to their health will allow her two daughters to visit their father at his place of residence in the City of New York every ten days or thereabouts, weather permitting.

Mrs. Wetmore to render an account as above specified, it being understood, of course, that the allowance will continue at the same rate, notwithstanding the whole amount may not have been disbursed in any one month, as provisions must be made for doctors, dentists and other bills of vari- 165
ous kinds, which are heavier during some months than others.

This arrangement having been agreed to by counsel in the interest of harmony, it is understood to be without prejudice to any legal rights which either Mr. or Mrs. Wetmore may have as against each other, in case it became necessary to enforce the same on the expiratioa or sooner termination of the present arrangement by reason of a breach of its provisions by either party.

I do not think it necessary to reduce the agreement to any more formal shape than I have done above nor to ask Mr. or Mrs. Wetmore to sign it.

166 I think if you will write me a line, saying that you understand the agreement as I do, that will be sufficient. If I have not expressed it quite as you understand it, please let me know. I have endeavored to state it with absolute fairness on both sides.

Hoping to hear from you very soon, I remain

Yours sincerely,

WILLIAM JAY.

F.

167

Law Offices,
168 Nassau Street,
New York.

FRANKLIN & CLIFFORD A. H. BARTLETT.

Dec. 26th, 1889.

COL. WILLIAM JAY,

My Dear Sir.—Your letter of December 23d correctly sets forth my understanding of our arrangements with this qualification: Major Wetmore does not consent to his wife's absence or to her refusal to return to him or to live with him
168 because he will not relinquish or give up rights which may have accrued to him or which may now accrue by reason of such absence or refusal—in other words, this arrangement is without prejudice to the rights and remedies of either party. The major cannot force his wife to live with him, and that is all she wants.

I enclose cheque for $416.67, allowance due this day for one month.

It is, of course, understood that the Webb proviso forms part of our understanding.

Yours very sincerely,

FRANKLIN BARTLETT.

Order Appointing Referee.

169

At a Special Term of the Supreme Court of the State of New York, held at the Court House in the city and County of New York, on the 15th day of February, 1892.

Present—Hon. EDWARD PATTERSON, Justice.

ANNETTE B. W. WETMORE
against
WILLIAM B. WETMORE.

170

And further hearing of this action having been had this day and testimony having been given on behalf of the plaintiff and the counsel for the respective parties plaintiff and defendant having in open Court consented to this order, now, after hearing Mr. Candler, of counsel for the plaintiff, and Mr. Hummel, of counsel for the defendant,

ORDERED, that John B. Pine, Esquire, be and he is hereby appointed Referee to take proofs and to ascertain what is the pecuniary condition of the defendant and to report the same with the testimony, and that the further hearing of this action proceed 171
before the Justice now present at Special Term on the first Monday of March, 1892.

A copy.

[Sd.] WM. J. MCKENNA,
Clerk.

172 **Clerk's Extract of Minutes as to Jury's Verdict.**

SUPREME COURT—CIRCUIT, PART I.

FEBRUARY 15th, 1892.

ANNETTE B. W. WETMORE
against
WILLIAM B. WETMORE.

Present—Hon. Edward Patterson.

173 I hereby certify that this cause was tried on November 18, 1891, by the Court and a Jury, and a verdict rendered therein upon the question submitted by the Court, viz.: Question. Did the defendant commit the various acts of adultery as charged in the complaint herein, or did he commit any or either of them as so charged?

The jury answered he committed the various acts as charged therein except as to that of March 23d, 1889.

WM. J. MCKENNA,
Clerk.

Fee paid.

174

Report of Referee.

175

NEW YORK SUPREME COURT.

ANNETTE B. W. WETMORE,
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

TO THE SUPREME COURT:

176

I, JOHN B. PINE, the Referee appointed in this action in and by the order dated at Special Term, on the 15th day of February, 1892, to take proofs and to ascertain what is the p cuniary condition of the defendant, and to report the same with the testimony, do respectfully report as follows:

First.—That I was served with a certified copy of the said order, and thereupon took and subscribed the oath required by law, which is hereunto annexed, and issued a Referee's summons, which is also hereto annexed, with proof of service upon the defendant's attorneys.

177

Second.—That on the return of the said summons the plaintiff attended before me in person, with Flamen B. Candler, her counsel, and the defendant also attended before me in person with Benjamin Steinhart, his counsel, and I thereupon proceeded to take proofs as to the pecuniary condition of the defendant, and that hereunto annexed are the proofs which have been taken before me on the reference under the said order.

Third.—That I have ascertained the pecuniary condition of the defendant, and do report the same as follows:

178 It appears from the evidence that at the time of the defendant's marriage with the plaintiff on the 12th of April, 1882, the defendant had no property except his horses and one hundred and sixty-eight acres of land in Kansas, of unknown value, and that he received from his father, Samuel Wetmore, an allowance of eight thousand dollars per annum (Part II, p. 50).

Samuel Wetmore died in March, 1885, leaving a last will and testament (Exhibit 3), under which the defendant came into possession of considerable property. By the terms of the will, $100,000 was left to the executors in trust to pay the income to the testator's son, this defendant, for life, and the
179 residuary estate was divided equally between the testator's widow and his said son. The exact amount and nature of the property received by the defendant as his share of the residuary estate does not appear, but it is in evidence that his share included:

Delaware & Lackawanna R. R. stock (Part II, p. 57);

New Jersey Central R. R. stock (Part II, p. 57);

St. Louis, Vandalia & Terra Haute R. R. bonds (Part II, p. 57);

St. Louis & Iron Mountain R. R. bonds (Part II, p. 57);

180 West Shore R. R. bonds (Part II, p. 57);

Lehigh & Wilkesbarre R. R. bonds (Part II, p. 57);

Niagara Fire Ins. Co. stock (Part II, p. 57);

Cairo & Fulton R. R. stock bonds (Part II, p. 59);

Chicago, St. P., Minn. & Omaha R. R. stock (Part II, p. 63);

Lehigh & Wilkesbarre Coal Co. stock (Part II, p. 63).

As above stated, no evidence has been adduced as to the value of the defendant's share of his father's residuary estate at the time it was set off to him, but in 1887 a list was prepared by the pri-

vate secretary of Mr. Seward Webb (Part I, p. 27), who had acted as the adviser of the defendant in regard to his investments, which list contained a statement of the various securities owned by the defendant in the fall of 1887 (Part I, p. 24), including reinvestments of the proceeds of sales of securities received by the defendant from his father's estate. The list has not been put in evidence, but it is shown by the testimony of Mr. Webb to have included the following securities (Part I, p. 5): 181

5	Chicago & N. W. Consol Bonds, Mkt. Value	$6,500
5	Lake Shore Consol Bonds, Mkt. Value	6,250
6	Chicago, St. Paul, Minn. & Omaha Bonds, Mkt. Value	7,800
8	Georgia Pacific, 1st mortgage Bonds Mkt. Value	8,000
100	Chicago & N. W. Preferred stock, Mkt. Value	14,000
425	Delaware, L. & W. stock, Mkt. Value	50,000
5	Lehigh & Wilkesbarre Consol Bonds	
100	Cairo & Fulton Stock	
6	Iron Mountain Bonds	
10	Morris & Essex Consol Bonds	
5	West Shore R. R. 1st mortgage Bonds	
5	St. Paul, Vandalia & Terra Haute Bonds,	
300	Wagner Palace Car Co. stock	72,000

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183

Mr. Webb also testified that the aggregate market value of the securities owned by the defendant in 1887 was about $200,000 (Part I, p. 9) and that the defendant's income from such securities was about $14,000 (Part I, p. 14).

The plaintiff, called as a witness by the defendant's counsel (Part II, p. 46), testified, the plaintiff's counsel not objecting, that she attended to the defendant's accounts, that she made a copy of a statement or "list" of the property of which his estate consisted (Part II, p. 53); that he talked to her very freely about his estate, and told her what

184 his income was, and when he sold any of his property (Part II, p. 53); that his income in 1887, when this list was made, was "over sixteen thousand dollars, some hundred and perhaps over," including the income from the trust estate, which was "four thousand and over four or five hundred dollars over" (Part II, p. 55); that the securities left to the defendant by his father in 1885, comprised stock of the Delaware and Lackawanna R. R. and of the New Jersey Central R. R.; also of the St. Louis, Vandalia & Terra Haute R.R., and St. Louis & Iron Mountain R.R.; also bonds of the Lehigh & Wilkesbarre R.R. and of the West Shore R.R., and stock of the Niagara
185 Fire Ins. Co.; also bonds of the St. Louis, Iron Mountain & Southwestern R.R. and of the Cairo & Fulton R.R., in all of the par value of $143,000 or $145,000 (Part II, pps. 57, 58, 59, 60).

In regard to this statement or list, the witness, Butler H. Bixby, testified on cross-examination by defendant's counsel that the statement showed the face value of the securities belonging to the defendant in March, 1889, to be $145,055, and the income to be $14,474.48 (Part II, p. 45), and (on re-direct examination) that the market value was over $200,000 (Part II, p. 46). The only direct evidence as to the market value of these securities is found in the
186 testimony last quoted and that of Mr. Webb, where it is placed at $200,000 and upwards, but this estimate received some corroboration from the testimony adduced as to the amount of income which it produced, viz.; $11,400, and from the account marked Exhibit B attached to this report. There is a variance as to the date when the list was made, but the plaintiff and Mr. Webb concur in saying that it was made in 1887 (Part I, p. 9) (Part II, p. 55). Accepting this as the correct date of the statement, it is established that the defendant was in 1887 in receipt of an income of $11,400, in addition to that produced by the trust estate, and that he owned securities of the face value of about

$145,000, and of the market value of about $200,- 187
000. The evidence upon these points is uncontradicted.

It further appears from the uncontradicted testimony of the plaintiff that the defendant never sold any of his securities to live upon, and did not exceed his income (Part II, p. 65). Tho' closely questioned by the defendant's counsel, who had made her his own witness, she states positively that while she and the defendant had lived up to the amount of his income, they had not exceeded it (Part II, p. 65, p. 55). It therefore follows that the value of the defendant's personal estate at the time of the separation in April, 1889, up to which time the 188
plaintiff had knowledge of the securities held by him, must be taken to be $200,000.

It appears that some of the securities mentioned in the statement were sold and the proceeds invested in other like securities, but it does not appear whether such transactions resulted in a profit or loss, except in the case of the Wagner Parlor Car Co. stock, which was bought for $42,000, and subsequently sold for $72,000. But as there is no evidence as to the valuation placed upon this stock in the statement above referred to, it is impossible to determine whether this represents an actual or only an apparent profit upon the 189
market value as estimated in 1887, and hence it cannot be added to the total estimated valuation of $200,000. It is fair to assume, however, that it does not represent a loss. In no other instance is there any evidence of either a profit or loss.

It further appears that the defendant has been the owner, since his father's death, of an interest in real estate situated in Newark, N. J., of the value of $7,500 (Part II, p. 13), making the total of the defendant's property in April, 1889, $207,500.

It also appears that he owns some furniture and certain real estate in Kansas, the value of which has not been shown.

190 The defendant having proved that his income at the time of his separation from his wife in April, 1889, was about $16,000, as above stated, offers no evidence of any diminution in such income since that date, leaving it to be assumed that his income has continued the same during the intervening period of about two years and ten months. Computed at this rate the income so received by him in this period amounts to $45,333.

These amounts may be summarized as follows:

Principal, April, 1889	$207,500.00
Income since April, 1889	45,333.00
	$252,833.00

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These amounts are taken collectively as the items which the defendant claims should be deducted therefrom, are partly chargeable against principal and partly against income, no evidence being offered which makes it possible to distinguish between them.

The defendant produced no evidence establishing that any part of the principal of his estate has been lost or expended since his separation from the plaintiff, but simply called a witness as an expert to establish an account which the witness had made up from loose memoranda and state-
192 ments furnished him by the defendant, which account is hereto annexed and is marked Exhibit "B" of March 4th, 1892. The presentation of the account by defendant's witness amounts to an admission by the defendant that he now owns the property therein specified, corresponding in some respects with the above-mentioned statement, and as it is not accompanied by any proof that he owns no other property, the presumption raised by the testimony of the plaintiff, Judge Bixby and Mr. Webb, is not affected.

From this account it appears that the following expenditures have been made by the defendant:

To extinguish an old debt.	$11,000.00
Shelbourne.....	5,000.00
Amount paid Annette Wetmore.....	9,068.40
Lawyers' fees, about.....	9,500.00
Other incidental expenses.....	26,500.00
Given to Annette Wetmore, 5-$1000 Bonds No. Pacific Ry. Co.....	5,000.00
2 other Bonds.....	2,000.00
Cash from principal..... . .	3,000.00
Diamonds taken out of safe	3,000.00
	$74,068.40

193

The item of $11,000, "To extinguishing an old debt," should be allowed, it not appearing whether the payment was made before or after April, 1889, and no serious objection to such allowance having been made. 194

The item of $5,000, "Shelbourne," should be disallowed, for, while the purpose of expenditure is unexplained, it is in evidence that the defendant resided at Shelbourne prior to April, 1889, and that they lived within his income, and it must therefore be assumed that expenditures made in connection with Shelbourne were made out of income received prior to that date.

The item $9,068 40, "Amount paid Annette Wetmore" is allowed, that being the amount paid to the plaintiff by the defendant since April, 1889, there being no objection to such allowance. 195

The item, $9,500.00. "Lawyer's fees," is allowed as being a charge incurrred subsequent to April, 1889.

The item of $26,500.00, "Other incidental expenses," represents an expenditure of $6,000.00 for furniture (Part II, pp. 85), and the balance ($20,500.00), appears to have been spent by the defendant directly or indirectly in connection with his divorce suit (Part II, p. 88). As the only testimony in the case as to the purchase of furniture relates to that which was purchased for the house at Shel-

196 bourne, prior to April, 1889, and which is still in the possession of the defendant, $6,000 of this item must be disallowed.

The items $5,000 and $2,000, "Given to Annette Wetmore, 5-$1000 bonds No. Pacific Ry. Co." and "2 other bonds," should be disallowed as it appears from the uncontradicted testimony of Mrs. Wetmore (Part II, p. 67), that these bonds were given to her before the statement of his property was made, and are therefore not included in the valuation of $200,000.00.

The item $3,000, "Cash from principal," should be disallowed, it appearing that this item represents the sum of $3,000, which was part of the proceeds
197 of the sale of a stable in Clinton Place, which the defendant received after the statement of 1887 was prepared, and gave to the plaintiff. As the stable property was not included in the statement this receipt and disposition of the price realized for it does not affect the aggregate of his property as estimated in 1887.

The item $3,000, "Diamonds taken out of safe," should be disallowed, as it appears that the diamonds in question were given to the plaintiff by the defendant as a Christmas present prior to their separation (Part II, p. 35), and that they were paid for January 25th, 1886 (Part II, p. 93), so that they
198 must be assumed to have been paid for out of income received prior to April, 1889.

The items so allowed the defendant as an offset against principal and interest charged to him are:

To extinguish an old debt.....	$11,000 00
Amount paid Annette Wetmore.	9,068 40
Lawyers' fees, about	9,500 00
Other incidental expenses.....	20,500 00
	$50,068 40

Considerable evidence has been offered as to the yacht *Lurline*, purchased by the defendent subsequent to April, 1889, and refitted at a total

cost of about $24,000.00. The amount expended for her may be regarded as a change of investment of principal, or as having been paid for out of income, or partly from principal and partly from income, but as she is still owned by the defendant the amount so expended has not been charged on either side of the account, and has been treated as a mere change of investment, not affecting the aggregate of the defendant's principal. 199

Taking the valuation of the defendant's individual estate to be the sum of $252,883.00
and deducting therefrom the items allowed as above stated..... ..... 50,068.40

I find the present value of the defendant's individual estate to be..... 202,814.60 200

This does not include furniture now owned by the defendant, nor the lands in Kansas now owned by him, the value of which has not been proven.

There has been no contention before me in respect to the value of the trust estate, or of the annual income thereof. In addition to the proofs which have been given before me to establish the amount of this trust estate, and its income, it has been expressly admitted by the defendant, as appears by the notes of testimony hereto annexed (Part II, p. 36) that the value of that trust estate is $100,000 and its annual income $4,500. 201

I therefore find and report that the present pecuniary condition of the defendant is, that he is the sole beneficiary of a trust estate of $100,000, from which he is in receipt of an annual income of $4,500, and that he is also possessed of an estate in his own right of the value of $200,000 and upwards, which includes two items of property not productive of income, namely, a steam yacht, of the value of $24,000, and unimproved real property in Newark of the value of $7,500, and that he also owns in addition 168 acres of land in Kansas and certain furniture.

And I also find and report that the individual property of the defendant, if properly invested, should produce an annual income of about $8,500 in addition to the income from the trust estate of $4,500, making together the annual sum of $13,000.

All of which is respectfully submitted.

Dated March 25, 1892.

JOHN B. PINE,
Referee.

Exhibit B, annexed to Referee's Report.

MEMORANDUM OF THE ESTATE OF WILLIAM BOERUM WETMORE.

Estate of Samuel Wetmore.		$143,000
Yielding an average income of about 4 1/2 %..	$6,400	
Samuel Wetmore left also a trust estate for the benefit of W. B. Wetmore.		
This Estate was appraised at about.....		100,000
The income from this was about.....	4,577	

Some of the securities left by his father:

		Income.
Of the other paper 10,500. 2 St Louis, Iron Mountain & So. Bonds.....	2,000	100
100 shares N. J. Central Lamp Imp. Stock.....	10,000	
5 Lehigh & Wilkesbarre R. R. Bonds.....	5,000	350
2 St. Louis & Iron Mountain Bonds.....	2,000	140
Other paper 20 shares Toledo preferred 200. 1 Toledo & Ohio Central, Common Stock.....	100	
10 Shares Anglo-American Cattle Co.....	5,000	

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The other securities left by his father were sold by him and invested in neighbourhood of about half of original estate of $143,000 in Wagner Palace Car Co. Stock. This stock was afterwards sold and turned into cash.

Other securitias held by Major Wetmore:

10 shares N. Y. & No. R. R. Bonds	1,000		
4 Canada Southern Bonds	4,000	200	206
11 Ga. & Pac. Inc. $1,000 Bonds 5%	11,000		
28 Ga. Pac. $500 Bonds 5%.	14,000		
2 Lake Shore Bonds	2,000	140	
4 Chicago & Northwest Consol. 7's Bonds	4,000	280	
2 Minneapolis & Omaha Bonds	2,000	120	
7 Georgia Pacific Bonds 6% Bonds	7,000	420	
	$69,100	1,750	

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Dr.

Extinguishment of old debt	$11 000
Shelbourne	5,000
Amount pd. Annette Wetmore	9,068.40
Lawyers' fees, about	9,500
Other incidental expenses	26,500
Given to Annette Wetmore 5 $1,000 Bonds No. Pacific R.	

208	R....	5,000	
	2 other bonds....	2,000	
	Cash from principal	3,000	
	Diamonds taken out of safe.....	3,000	
		$74,068.40	74,068.40
	Furnishing house part of above..	$26,500	
	Amount.....	6,000	
	Yacht and repairs thereto..		24,000
209	Total assets and expenditures, &c.....		$143,168.40

Affidavit of Plaintiff, April 1st, 1892, re Alimony.

SUPREME COURT.

ANNETTE B. W. WETMORE,
Plaintiff,

against

210

WILLIAM B. WETMORE,
Defendant.

City and County of New York, ss.:

ANNETTE B. W. WETMORE, being duly sworn, says:

That she is the plaintiff in this action.

That the last payment which was made to deponent by the defendant on account of temporary alimony under the order made herein and dated at

Special Term on the 10th day of December, 1890, was the sum of $416.66, which she received in a check from the defendant, on or about the 10th day of February, 1892, and that the payment of a like sum which became due under the terms of said order, on or about the 10th day of March, 1892, has not been paid, nor has any part of the same been paid, nor has deponent received any sum whatever from the said defendant for temporary alimony except the payments up to and including the 10th day of February, 1892. 211

ANNETTE B. W. WETMORE.

Sworn to before me this 1st day of April, 1892. 212

BENJ. W. BUCHANAN,
Notary Public,
New York Co,

Findings.

At a Special Term of the Supreme Court of the State of New York, held in the Court House, in the City and County of New York, on the first day of April, 1892. 213

Present—Hon. EDWARD PATTERSON, Justice.

ANNETTE B. W. WETMORE,
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

This action having been tried before the Justice now present and the proofs and allegations of the

214 respective parties having been taken and heard, and the verdict of the jury on the issues of fact as to the acts of adultery committed by the defendant having been duly entered, and the Court by the consent of the parties and their counsel in open Court having made an order of reference to John B. Pine, Esq., as referee to take proofs and to ascertain the pecuniary condition of the defendant and to report the same with the testimony, and the said referee having made, certified to the Court and filed his report dated March 25th, 1892, with the testimony taken and the other proceedings had before him, and the further hearing having been thereupon had and the trial having been com-
215 pleted, the Court doth find the following.

Facts.

First.—That on the twelfth day of April, 1882, at Grace Church, in the City of New York, in the State of New York, the plaintiff, whose maiden name was Annette B. Wetmore, intermarried with the defendant, William B. Wetmore.

Second.—That the marriage ceremony between the plaintiff and defendant was performed at the date and place aforesaid by the Rev. C. Potter, Doctor of Divinity, who was then the Rector of
216 Grace Church above mentioned, according to the rites of the Protestant Episcopal Church in the United States and according to the laws of the State of New York, and thereupon the plaintiff became, has been ever since, and is now the wife of the defendant.

Third.—That the plaintiff and the defendant were at the time of the commission of the several acts of adultery hereinafter mentioned and they are now residents of the State of New York and severally dwell therein.

Fourth.—That on Wednesday, the third day of

April, 1889, and on the night between that day and Thursday the 4th day of April, 1889, at a certain house of prostitution known as No. 14 West 24th street, in the said City of New York, the defendant committed adultery with a woman whose name is to the plaintiff un known. 217

Fifth.—That a few days thereafter and on Monday, the 8th day of April, 1889, and in the night between that day and Tuesday, the 9th day of April, 1889, at the said house known as No. 14 West 24th street, in said City of New York, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

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Sixth.—That a few days thereafter and on Saturday, the 15th day of April, 1389, at the said house known as No. 14 West 24th street, in the said City of New York, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

Seventh.—That a few days thereafter and on Tuesday, the 23d day of April, 1889, and on the night between that day and Wednesday, the 24th day of April, 1889, at the said house known as No. 14 West 24th Street in the said City of New York, the defendant again committed adultery with a woman whose name is to the plaintiff unknown. 219

Eighth.—That on Sunday, the 9th day of March, 1890, and on the night between that day and Monday, the 10th day of March, 1890, at a house of assignation in the City of Denver, in the State of Colorado, the said house being situated on the southeast corner of Market and Twenty-second streets, in the City of Denver, the defendant committed adultery with a woman whose name is Bertha Henderson.

Ninth.—That a few days subsequently thereto and on Wednesday, the 12th day of March, 1890,

220 and on the night between that day and Thursday, the 13th day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson.

Tenth.—That a few days subsequently thereto and on Saturday, the 15th day of March, 1890, and on the night between that day and Sunday, the 16th day of March, 1890, the defendant again committed adultery at the house aforesaid with the said Bertha Henderson.

Eleventh.—That a few days subsequently thereto and on Tuesday, the 18th day of March, 1890, and
221 on the night between that day and Wednesday, the 19th day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson.

Twelfth.—That a few days subsequently thereto and on Thursday, the 20th day of March, 1890, and and on the night between that day and Friday, the 21st day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson.

Thirteenth.—That a few days subsequently thereto and on Saturday, the 22d day of March,
222 1890, and on the night between that day and Sunday the 23d day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson.

Fourteenth.—That a few days subsequently thereto and on Monday the 24th day of March, 1890, and on the night between that day and Tuesday the, 25th day of March, 1890, the defendant again committed adultery at the house aforesaid in Denver with the said Bertha Henderson.

Fifteenth.—That on the 20th day of May, 1890, and on the night between that day and the 21st

day of May, 1890, at the above-mentioned house in 223
the city of New York, known as No. 14 West 24th street in said city, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

Sixteenth.—That on the 22d day of May, 1890, and on the night between that day and the 23d day of May, 1890, at the above-mentioned house in the city of New York, known as No. 14 West 24th street in said city, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

Seventeenth.—That on the 24th day of May, 1890, 224
and on the night between that day and the 25th day of May, 1890, at the above-mentioned house in the City of New York, known as No. 14 West 24th street, in said city, the defendant again committed adultery with a woman whose name is to the plaintiff unknown.

Eighteenth.—That the aforesaid acts of adultery were committed by the defendant without the consent, connivance, privity or procurement of the plaintiff, and five years have not elapsed since the plaintiff discovered the facts of such adultery, and the plaintiff has not cohabited with the said defendant since the commission of the acts of adult- 225
ery above mentioned or any of them.

Nineteenth.—That there is no judgment or decree in any court of the State of New York, or of any court whatsoever, against the plaintiff in favor of the defendant for a divorce on the ground of adultery or otherwise.

Twentieth.—That there have been three children born of the marriage of the plaintiff and the defendant, namely, a daughter, Wenonah, born on the 1st day of February, 1883, a daughter, Dagmar, born on the 24th day of January, 1887, and a son,

226 Louis Hoffman, born on the 19th day of September, 1889, and that thereafter and in or about the month of June, 1890, this action was commenced.

Twenty-first.—That on the trial of this action the said defendant conceded and admitted that the plaintiff would be entitled to the care and custody of all the said three children in case the Court should decide that there should be a judgment or decree in this action in favor of the plaintiff, granting her a divorce.

Twenty-second.—That the present pecuniary condition of the defendant is that he is the sole bene-
227 ficiary of a trust estate of One hundred thousand dollars, from which he is in receipt of an annual income of Four thousand five hundred dollars, and that he is also possessed of an estate in his own right of the value of Two hundred thousand dollars and upwards, which includes two items of property not productive of income, namely, a steam yacht of the value of twenty-four thousand dollars, and unimproved real property in Newark of the value of Seven thousand five hundred dollars, and that he also owns, in addition, one hundred and sixty-eight acres of land in Kansas, and certain furniture. And that the individual property of
228 the defendant, if properly invested, would produce an annual income of about Eight thousand five hundred dollars, in addition to the income of his trust estate of Four thousand five hundred dollars, making together the annual sum of Thirteen thousand dollars.

Twenty-third.—That the plaintiff and defendant separated on or about the 17th day of April, 1889, and this action was commenced by the service of the summons and a copy of the complaint on the defendant, personally, on the twelfth day of June, 1890, in the State of New York, and that for some considerable time before the commencement of this action, being in all about nine months, and for a

period of about six months, being from the time of 229
the commencement of this action until the 11th day of December, 1890, the defendant contributed nothing for the maintenance and education of the said three children of the said marriage, or for the support of the plaintiff, except that before the commencement of this action he paid about the sum of five hundred dollars for physicians' and nurses' bills, which were incurred at the time of the birth of the defendant's son, the said Louis Hoffman Wetmore.

Twenty-fourth.—That the plaintiff's means do not exceed in amount Three thousand dollars.

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Twenty-fifth.—That an order was duly made and entered in this action dated at Special Term on the 10th day of December, 1890, which amongst other things directed the defendant to make monthly payments to the plaintiff, at the rate of Five thousand dollars per annum, commencing on the 10th day of December, 1890, and until otherwise directed by the Court for the maintenance and education of the said three children and for the support of the plaintiff; and since the making of that order the defendant has made the monthly payments therein required up to and including the 10th day of February, 1892, and that for a period of seven months and twenty days since the commencement of this 231
action and up to the first day of April, 1892, nothing by way of temporary alimony or monthly payments has been made by the defendant to the plaintiff, and the sum of the said monthly payments at the rate of five thousand dollars per annum for the said seven months and twenty days altogether amounts to the sum of three thousand one hundred and seventy-eight dollars and nine cents.

And the Court doth find the following

232 CONCLUSIONS OF LAW.

First.—That the plaintiff is entitled to a judgment in this action in her favor which should provided as follows:

1st. That the marriage between the plaintiff, Annette B. W. Wetmore, and the defendant, William B. Wetmore, mentioned in the said complaint and herein mentioned and found, and which took place on or about the 12th day of April, 1882, in the City of New York, be dissolved.

2d. That there be granted unto the plaintiff an absolute divorce from the defendant, and freeing
233 them from the obligations of the said marriage and awarding to the plaintiff the custody and care of the said three children of the said marriage mentioned, in the said complaint and hereinabove mentioned and granting unto her liberty to resume her maiden name, Annette B. Wetmore, and adjudging that it shall be lawful for her to marry again in the same manner as if the said William B. Wetmore, the defendant, was actually dead, and adjudging that it shall not be lawful for the said defendant, William B. Wetmore, to marry again until the plaintiff, Annette B Wetmore, shall be actually dead, but nothing contained, or contained in the judgment made in this action shall prevent
234 the re-marrying of the parties to this action, plaintiff and defendant, and adjudging that the plaintiff have and hold all the personal property in her possession or under her control left with her by the defendant or acquired by her own industry or given to her by bequest or otherwise.

3d. That there should be granted to the said plaintiff the sum of Three thousand Dollars annually, so long as she shall live, to be paid by the said defendant in equal quarter—yearly payments of Seven hundred and fifty Dollars on the first days of July, October, January and April, in each year, the first of said payments to be for the period

from the date hereof up to the first day of July, 235
1892, and to be the sum of Seven hundred and fifty Dollars, and to be paid on the first day of July, 1892, which said annual sum of Three thousand Dollars is by the Court considered and deemed a suitable allowance having regard to the circumstances of the respective parties for the support of the plaintiff.

4th. That there should be granted to the said plaintiff the sum of One thousand dollars annually for the maintenance and education of the plaintiff's said child, Wenonah Wetmore, so long as she shall live and until she shall attain the age of twenty-one years, and the further sum of One 236
thousand dollars annually for the maintenance and education of the plaintiff's said child, Dagmar Wetmore, so long as she shall live and until she shall attain the age of twenty-one years, and the further sum of One thousand dollars annually for the maintenance and education of the plaintiff's said child, Louis Hoffman Wetmore, so long as he shall live and until he shall attain the age of twenty-one years; such payments to be made by the defendant to the plaintiff quarter-yearly, that is to say on the first day of each July, October, January and April, the first payment to be made for each of the said children to be for the period from the date hereof up to the first day of July, 1892, and to be 237
the sum of Seven hundred and fifty dollars in the aggregate to be paid on the first day of July, 1892, which said annual sums allowed to the plaintiff and the children, amounting together to Six thousand dollars are by the Court considered and deemed a suitable allowance, having regard to the circumstances of the respective parties and the ages and conditions of the said children for the maintenance and education of the said children.

5th. That the defendant within ten days after service upon him of a certified copy of the judgment to be made in this action shall give reason

able security for the payment from time to time of the said sums of money required to be paid by the said defendant for the support of the plaintiff so long as she shall live, which said security shall be given by the defendant by his executing with two sufficient securities a bond to the People of the State of New York in the penal sum of Twenty-five thousand dollars conditioned for the payment to the plaintiff for her support so long as she shall live of the aforesaid sum of Three thousand dollars annually in quarterly payments as aforesaid, and by causing the said bond to be approved by a Justice of this Court upon five days' notice to the plaintiff's attorneys, and by filing the said bond with such approval endorsed thereon in the office of the Clerk of the City and County of New York.

6th. That the defendant within ten days after service upon him of a certified copy of the judgment to be made in this action shall give such further reasonable security for the payment from time to time of said sums of money required to be paid by the said defendant for the maintenance and education of the said three children respectively, as to each of the said children respectively so long as such child shall live or until he or she shall attain the age of twenty-one years, and which said security shall be given by the defendant by his executing with two sufficient sureties a bond to the People of the State of New York in the penal sum of Twenty-five thousand dollars conditioned for the payment of the aforesaid sums of One thousand, being in all Three thousand dollars respectively annually in quarterly payments as aforesaid to the plaintiff for the maintenance and education of each of the said three children respectively as aforesaid and by causing the said bond to be approved by a Justice of this Court, upon five days' notice to the plaintiff's attorneys and by filing the said bond with such approval endorsed thereon in the office of the Clerk of the City and County of New York.

7th. That the plaintiff recover of the defendant her costs and disbursements in this action. 241

And I do decide and direct judgment accordingly. And that nothing in the decree to be entered in this action contained shall be construed to affect the right of the plaintiff to institute such proceedings as may be proper and lawful for enforcing against the defendant or his property any claim that may exist for unpaid temporary alimony under the order of this Court made and entered in this action and dated at Special Term, on the 10th day of December, 1890, up to this date.

New York, April 1, 1892. 242

EDWARD PATTERSON,
J. S. C.

[L. S.] A Copy.
WM. J. MCKENNA,
Clerk.

Messrs. HOWE & HUMMEL,
Attorneys for defendant.

Gentlemen.—Please take notice that the foregoing is a copy of the findings duly made and entered in the within entitled action, and duly filed in the office of the Clerk of the City and County of New York, at the Court House in the City of New York. 243

Dated New York, April 8th, 1892.

Yours, &c.,

JAY & CANDLER,
Attorneys for Plaintiff,
48 Wall Street,
New York.

Judgment.

NOTE.—For copy of this decree and judgment, see *supra*, pages 15 to 20 of these printed papers.

244 **Affidavit and Order directing Clerk to docket Judgment.**

At a Special Term of the Supreme Court of the State of New York, held at the Court House in the City and County of New York, on the 16th day of January, 1893.

Present—Hon. EDWARD PATTERSON, Justice.

ANNETTE B. W. WETMORE,
Plaintiff,

245 *against*

WILLIAM B. WETMORE,
Defendant.

Order.

On reading the judgment roll filed in the office of the Clerk of the City and County of New York on April 8th, 1892, and on reading and filing the annexed affidavit, and on motion of Jay & Candler, plaintiff's attorneys,

ORDERED, that the Clerk of the City and County of New York forthwith, upon this order being en-
246 tered, docket the judgment in this action in favor of the plaintiff, Annette B. W. Wetmore, against the defendant, William B. Wetmore, for the sum of $1,500, and interest thereon from July 1st, 1892, and for the further sum of $1,500 and interest thereon from October 1st, 1892, and for the further sum of $1,500 and interest thereon from January 1st, 1893, making together the sum of $4,500, with interest.

Enter,

E. P.,
J. S. C.

NEW YORK SUPREME COURT. 247

ANNETTE B. WETMORE,
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

Affidavit.

City and County of New York, ss.:

FLAMEN B. CANDLER, being duly sworn, says that he is one of the attorneys for the plaintiff in 248
the above-entitled action. That on or about the 11th day of April, 1892, a certified copy of the judgment made in this action, dated at Special Term on April 1st, 1892, and duly entered and filed in the office of the Clerk of the City and County of New York on the 8th day of April, 1892, was duly served upon Messrs. Howe & Hummel, the attorneys for the defendant, William B. Wetmore, and that up to the present time the defendant has made no payment for alimony or for the support and education of plaintiff's three infant children, as required by the said judgment, and the said defendant has made default also in failing to give 249
security in two bonds of $25,000 each as required by said judgment.

DEPONENT FURTHER SAYS that under and pursuant to the terms of the said judgment there became due and payable to the plaintiff from the defendant on July 1st, 1892, the sum of $1,500, and on October 1st, 1892, the further sum of $1,500, and on January 1st, 1893, the further sum of $1,500, making in all now due and owing to the plaintiff from the defendant under the said judgment the sum of $4,500, with interest on each of the said instalments of $1,500 from the

250 dates when they became due respectively, as hereinabove stated.

DEPONENT FURTHER SAYS that it has now become necessary in order to enable the plaintiff with greater security to enforce her rights under the said judgment for the said three instalments, amounting to $4,500, should be now docketed in the office of the Clerk of the City and County of New York, where the said judgment and the judgment roll were filed on April 8th, 1892, and deponent now asks on behalf of the plaintiff for the annexed order requiring the Clerk of the City and County of New York to docket
251 the said judgment.

FLAMEN B. CANDLER.

Sworn to before me this 16th day of January, 1893.

WILLIAM E. RUDISCHHAUSER,
Notary Public (52),
N. Y. Co.

Statement in lieu of testimony contained in judgment roll of Wetmore vs. Wetmore.

252 For the purposes of this appeal, and to avoid unnecessary printing, it is hereby conceded that it has been conclusively determined by the judgment in the action that the evidence and testimony contained in the judgment roll sustained and established all the facts found by the Court upon which the judgment was rendered.

Order authorizing foregoing statement in lieu of testimony. 253

At a Special Term, Part I of the Supreme Court, County of New York, held at the County Court House, in said County, on the 13th day of February, 1902.

Present—Hon. FRANCIS M. SCOTT, Justice.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff, 254

against

WILLIAM B. WETMORE,
Defendant.

An order having been obtained by the above-named defendant on February 4, 1902, from Mr. Justice Beach, directing the plaintiff or her attorneys to show cause why said defendant should not be granted permission to omit from the appeal book on appeal taken by him from the order herein of December 30, 1901, certain portions of the 255 judgment roll recited in said order of December 30th, 1901, and to insert in the appeal book in lieu thereof a statement in reference thereto, and why an extension of time to print, file and serve the papers upon the said appeal should not be granted, and the motion of said defendant upon said order to show cause coming on duly to be heard, NOW, on reading and filing said order to show cause and the affidavit of Vincent P. Donihee, verified February 4, 1902, with the papers recited therein and annexed thereto, in support of said motion, and the affidavit of Flamen B. Candler, Esq., verified February 5th, 1902, in opposition to said motion,

256 and after hearing Vincent P. Donihee, Esq., of counsel for the defendant, and Flamen B. Candler, Esq., of counsel for the plaintiff, it is, on motion of HATCH & WICKES, attorneys for the said defendant,

ORDERED that the above-named defendant may omit from his appeal book on the appeal taken by him from the order herein of December 30, 1901, the evidence, depositions and testimony filed with or contained in the judgment roll in this action, and in lieu thereof may insert in the said appeal book a statement as follows: "For the purposes of this appeal, and to avoid unnecessary printing, it is
257 hereby conceded that it has been conclusively determined by the judgment in the action that the evidence and testimony contained in the judgment roll sustained and established all the facts found by the Court upon which the judgment was rendered."

FURTHER ORDERED that the above-named defendant be and he hereby is granted fifteen days after the entry and service of this order in which to print, file and serve his papers upon the appeal so taken by him from said order.

Enter,

F. M. S.,

258 J. S. C.

Proof of service of motion papers on plaintiff's attorneys. 259

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

ANNETTE B. W. WETMORE (now ANNETTE B. MARKOE),
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

Affidavit. 260

County of New York, ss. :

WILLIAM A. ANSLEY, being duly sworn, says: that he is over the age of twenty-one years. That on the 19th day of December, 1901, at No. 48 Wall street, in the Borough of Manhattan, City of New York, he served the annexed notice of motion for injunction and affidavit on Messrs. Jay & Candler, attorneys for the plaintiff herein in this action, by delivering a copy of the same to Egerton L. Winthrop, Jr., personally and leaving the same with him. He further says that he knew the person 261 served as aforesaid to be a member of the said firm of Jay & Candler, the attorneys for the plaintiff in this action, and was so informed by said Egerton L. Winthrop, Jr.

WILLIAM A. ANSLEY.

Sworn to before me this 21st day of December, 1901.

WM. C. CRANE,
Notary Public,
New York County.

262 **Memorandum decision of Mr. Justice Scott, denying defendant's motion, December 24, 1901.**

WETMORE *v.* WETMORE. Motion denied with $10 costs, upon authority of *re* Anderson (97 Fed. Rep., 321); Maisner *vs.* Maisner (62 App. Div., 286) and Audoden *vs.* Schufeldt (181 U. S., 575).

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

263 ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

STATE OF NEW YORK, *County of New York*, } ss.:

264 VINCENT P. DONIHEE, being duly sworn, says that he is the managing attorney in the office of Hatch & Wickes, attorneys for William B. Wetmore, the defendant above-named; that no opinion was handed down by Mr. Justice Scott on denying the motion made by the defendant for an injunction order, other than that contained in the foregoing memorandum of decision denying the said motion.

VINCENT P. DONIHEE.

Sworn to before me this 15th day of January, 1902.

CHARLES R. LA RUE,
Notary Public,
New York County.

Order of Mr. Justice Scott of December 30, 1901, denying defendant's motion for an injunction, being order appealed from. 265

At a Special Term, Part I of the Supreme Court of the State of New York, held at the County Court House, in the County of New York, on the 30th day of December, 1901.

Present—Hon. FRANCIS M. SCOTT, Justice.

266

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff,

against

WILLIAM B. WETMORE,
Defendant.

A motion having been made in the above-entitled action by the defendant, William B. Wetmore, "for an order enjoining and restraining the above-named plaintiff and her attorneys from issuing execution upon the judgment of this Court, dated 267
the 1st day of April, 1892, or if execution has been issued, from enforcing the same in any way for the collection of arrears of alimony and allowance for the support and education of the three children of the said plaintiff and defendant under said decree of divorce which accrued and became due on or before January 13th, 1899, amountiug to the sum of $19,221.60, and from collecting or attempting to collect the judgment in this action so far as relates to such arrears, or from instituting any proceeding in this action or any action or actions founded upon claims for arrears of alimony and allowance

for the support of said children, and perpetually enjoining and staying all proceedings in this action or any other action founded upon such arrears or upon any cause of action arising therefrom upon the part of the plaintiff herein or her attorneys or agents, or on the part of any person or corporation acting or pretending to act on the part of said plaintiff or her attorneys or agents, and for such other and further relief as to the Court may seem proper."

On reading and filing notice of motion for the said order, dated New York, December 19th, 1901, and the affidavit thereto annexed of the defendant, William B. Wetmore, verified on the 18th day of December, 1901, and Exhibits A, B and C therein referred to and annexed thereto, and proof of service of said notice, affidavit and exhibits, all on the part of the said defendant, William B. Wetmore, in support of said motion, and on reading the judgment roll in this action filed in the office of the Clerk of the County of New York, on the 8th day of April, 1892, and on reading and filing the affidavit of the plaintiff, Annette B. Markoe, verified on the 23d day of December, 1901, and the affidavit of Flamen B. Candler, verified on the 23d day of December, 1901, and Exhibit A therein referred to and annexed thereto, all on behalf of the plaintiff and in opposition to the said motion, and after hearing Thomas P. Wickes, Esq., of counsel for the defendant, William B. Wetmore, in support of the said motion, and Flamen B. Candler, Esq., of counsel for the plaintiff in opposition thereto, and after due deliberation, and on motion of Jay & Candler, attorneys for the plaintiff,

ORDERED, that the said motion be and the same is hereby denied with ten dollars costs to be paid by the defendant, William B. Wetmore, to the plaintiff.

Ent.

F. M. S.,

J. S. C.

Messrs. HATCH & WICKES,
Attorneys for the Defendant. 271

Sirs.—Please take notice that the foregoing is a copy of an order duly made and entered and this day duly filed in the office of the Clerk of the County of New York, at the County Court House, in the County of New York.

Dated New York, December 30th, 1901.

Yours, &c.,

JAY & CANDLER,
Attorneys for Plaintiff,
48 Wall Street,
New York City. 272

Certificate of County Clerk.

STATE OF NEW YORK, } ss.:
County of New York, }

I, Thomas L. Hamilton, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do hereby certify that the foregoing consists of certified copies of the notice of appeal, the order appealed from and the papers on which the Court below acted in making said order.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 28th day of April, A. D. 1902. 273

THOMAS L. HAMILTON,
Clerk.

[SEAL.]

Order of Affirmance.

274

At a Stated Term of the Appellate Division of the Supreme Court, First Department, held at the Court House thereof, in the County of New York, on the 26th day of May, 1902.

Present—Hon. EDWARD PATTERSON,
Hon. MORGAN J. O'BRIEN,
Hon. CHESTER B. MCLAUGHLIN,
Hon. EDWARD W. HATCH,
Hon. FRANK C. LAUGHLIN,
JJ.

275

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff-Respondent,

against

WILLIAM B. WETMORE,
Defendant-Appellant.

The defendant, William B. Wetmore, having appealed to the Appellate Division of the Supreme Court, First Department, from the order of the Supreme Court County of New York, entered in 276
the above-entitled action, in the office of the Clerk of the Supreme Court, County of New York, on the 30th day of December, 1901, denying the motion made in the above-entitled action by said defendant William B. Wetmore, for an order enjoining and restraining collection and staying proceedings and actions upon arrears of alimony and support allowance accruing on or before January 13, 1899, under the judgment of this Court, dated the 1st day of April, 1892, and said appeal having been taken from each and every part of said order, and the said appeal coming on duly to be heard, and after hearing Thomas P. Wickes, Esq., of counsel

277 for the defendant-appellant, and Flamen B. Candler, Esq., of counsel for the plaintiff-respondent, and due deliberation having been had thereon, now on motion of Jay & Candler, Esqs., attorneys for the plaintiff-respondent, it is

ORDERED, that the said order so appealed from be and the same hereby is affirmed with $10 costs and disbursements to the plaintiff-respondent.

Enter,

Affidavit of no Opinion.

278 STATE OF NEW YORK, } ss.:
County of New York, }

JOHN H. WEBSTER, being duly sworn, says: That he is the managing attorney for Hatch & Wickes, the attorneys for the defendant-appellant herein; that he is familiar with all the proceedings had in this action; that no opinion was handed down by the Justices of the Appellate Division of this Court, First Department, in deciding the defendant-appellant's appeal herein.

JOHN H. WEBSTER.

Sworn to before me this }
279 29th day of May, 1902. }

BANTON MOORE,
Notary Public,
New York County.

Notice of Appeal to Court of Appeals. 280

SUPREME COURT,

COUNTY OF NEW YORK.

ANNETTE B. W. WETMORE (now ANNETTE B. MARKOE),
Plaintiff-Respondent,

against

WILLIAM B. WETMORE,
Defendant-Appellant.

Notice of Appeal to Court of Appeals.

281

Sirs.—Take notice, that the defendant-appellant herein, William B. Wetmore, hereby appeals to the Court of Appeals of the State of New York from the order herein of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division, on the 29th day of May, 1902, and filed in the office of the Clerk of the County of New York on the 31st day of May, 1902, affirming the order of the Supreme Court, County of New York, entered and filed in the office of the Clerk of New York County, on the 30th day of December, 1901, denying the motion made in the above-entitled action by said defendant, William B. Wetmore, for an order enjoining and restraining collection and staying proceedings and actions upon arrears of alimony and support allowance accrued on or before January 13th, 1899, under the judgment of this Court, dated the first day of April, 1892, and which motion is more particularly described in the said order hereby appealed from; And further take notice that the said appeal is taken from and said defendant-

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appellant hereby appeals from each and every part of said order.

Dated New York, May 31st, 1902.

Yours, &c.,

HATCH & WICKES,
Attorneys for Defendant-Appellant,
No. 100 Broadway,
Borough of Manhattan,
New York City, N. Y.

To JAY & CANDLER, Esqs.,
Attorneys for Plaintiff-Respondent,
No. 48 Wall Street,
New York City, N. Y.

To THOMAS L. HAMILTON, Esq.,
Clerk of the County of New York.

STATE OF NEW YORK, }
County of New York, } ss.:

I, THOMAS L. HAMILTON, clerk of the said county, and clerk of the Supreme Court of said State for said county, do certify that I have compared the preceding with the original Appellate Division order and Notice of Appeal, Annette B. Wetmore (now Annette B. Markoe), *vs.* William B. Wetmore, on file in my office, and that the same are correct transcripts therefrom, and the whole of such originals.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, this 31st day of May, 1902.

[SEAL.]

THOS. L. HAMILTON,
Clerk.

Remittitur.

286

Court of Appeals,
State of New York, } ss.:

Pleas in the Court of Appeals held at the Capitol in the City of Albany on the 27th day of June in the year of our Lord one thousand nine hundred and two before the Judges of said Court.

Witness—The Hon. ALTON B. PARKER, Chief Judge Presiding.

W. H. SHANKLAND, Clerk.

Remittitur, June 28th, 1902. 287

ANNETTE B. W. WETMORE (Now Markoe),
Respondent,

against

WILLIAM B. WETMORE,
Appellant.

Be it remembered that on the 2nd day of June in the year of our Lord one thousand nine hundred and two, William B. Wetmore, the appellant 288
in this action, came here into the Court of Appeals, by Hatch & Wickes, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department, and Annette B. Wetmore (now Markoe) the respondent in said action, afterwards appeared in said Court of Appeals, by Jay and Candler, her attorneys, which said notice of ap-

289 peal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals, this cause having been submitted on the part of counsel for the appellant and argued by Mr. Flamen B. Candler of counsel for the respondent and after due deliberation had thereon, did order and adjudge that the appeal from the order of the Appellate Division of the Supreme Court be and the same hereby is dismissed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court there to be pro-
290 ceeded upon according to law,

Therefore it is considered that the said appeal be dismissed with costs as aforesaid.

And hereupon as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the Statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof, etc.

W. H. Shankland,

291 Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's office.

Albany, June 28, 1902.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals with the papers originally filed therein, attached thereto.

W. H. Shankland

[SEAL.] Clerk.

Order of Remittitur.

292

At a Special Term, Part 2 of the Supreme Court of the State of New York, held at the County Court House in the County of New York on the 7th day of July, 1902.

Present—Hon. CHARLES H. TRUAX, Justice.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff-Respondent,

293

against

WILLIAM B. WETMORE,
Defendant-Appellant.

An appeal having been taken by the defendant William B. Wetmore to the Court of Appeals from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department, made in the above entitled action, dated on the 23rd day of May, 1902, and entered in the office of the Clerk of the said Appellate Division on the 29th day of May, 1902, and filed in the office of the Clerk of the County of New York on the 31st day of May, 1902, which said order affirmed an order of the Special Term of the said Supreme Court, dated on the 30th day of December, 1901, and duly entered and filed in the office of the Clerk of the County of New York on the 30th day of December, 1901, denying the motion made in the above entitled action by the defendant William B. Wetmore for an order enjoining and restraining collection and staying proceedings and

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actions upon arrears of alimony and support allowance accrued on or before January 13th, 1899, under the judgment of this Court, dated the 1st day of April, 1892, and the said Court of Appeals, this cause having been submitted on the part of counsel for the appellant and argued by Mr. Flamen B. Candler of counsel for the respondent, and after due deliberation had thereon, having ordered and adjudged that the said appeal from the said order of the said Appellate Division of the Supreme Court appealed from herein be dismissed with costs, and thereupon as well as the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by them given in the premises, having been by the said Court of Appeals remitted into this Court before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in this Court before the Justices thereof, &c.,

Now on reading and filing the remittitur from the said Court of Appeals, and on motion of Jay & Candler, the attorneys for the plaintiff and respondent Annette B. Wetmore (now Annette B. Markoe),

It is ordered that the said judgment of the Court of Appeals be, and the same is hereby made the judgment of this Court, and that the said appeal so taken by the said defendant and appellant William B. Wetmore to the said Court of Appeals be, and the same is hereby dismissed with costs to be adjusted by the Clerk of the County of New York.

Enter,

C. H. T.,
J. S. C.

Certificate of County Clerk.

298

State of New York, } ss.:
County of New York, }

I, Thomas L. Hamilton, Clerk of the County of New York, and Clerk of the Supreme Court of the State of New York for said County, do certify that I have compared the preceding copy of remittitur and return to notice of appeal attached thereto, said return being the record upon said appeal, and the order on remittitur, with the original of such papers, in the action Annette B. W. Wetmore (now Annette B. Markoe) against William B. Wetmore, on file in my office, and that the same are correct transcripts therefrom and 299
of the whole of such originals.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this day of April, 1903.

Clerk.

300

301 **Notice of Motion.**

SUPREME COURT.

APPELLATE DIVISION—FIRST DEPARTMENT.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff-Respondent,

against

WILLIAM B. WETMORE,
302 Defendant-Appellant.

Notice of Motion.

Sirs:

Please take notice that upon the annexed affidavits of Thomas P. Wickes and John H. Webster, duly verified the 16th day of October, 1902, upon the printed papers on the appeal herein to this Court from the order of Mr. Justice Scott, dated the 30th day of December, 1901, and the record and all the proceedings had upon said appeal, the undersigned will move this Court, at a term thereof, to be held at the Appellate Division Court House, in the County of New York, on Friday, the 24th day
303 of October, 1902, at one o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, for an order allowing the above named defendant-appellant to appeal to the Court of Appeals from the order of affirmance made by this Court on the 26th day of May, 1902, affirming the said order of Mr. Justice Scott made and entered in the above entitled action on the 30th day of December, 1901, and for the certification by this Court, under the provisions of subdivision two of Section 190 of the Code of Civil Procedure, of the

following question, for review by the Court of Appeals, namely: 304

> Was the claim of the plaintiff for arrears of alimony and allowance, under the decree of divorce in the above entitled action, which accrued prior to the filing of his petition in bankruptcy by the defendant, or any part of said claim, extinguished by his discharge in bankruptcy?

and for such other and further relief as to the Court shall seem proper.

Dated New York, October 16, 1902.

Yours, etc., 305

HATCH & WICKES,
Attorneys for Appellant,
100 Broadway,
Borough of Manhattan,
New York City

To

Messrs. Jay & Candler,
Attorneys for Respondent,
48 Wall Street,
New York City.

306

307 **Affidavit of John H. Webster.**

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff-Respondent,

against

WILLIAM B. WETMORE,
Defendant-Appellant.

308

State of New York,
County of New York, } ss.:

John H. Webster, being duly sworn, says that he is managing attorney in the office of Hatch & Wickes, attorneys for the defendant-appellant in the above entitled action.

That on the appeal heretofore taken by the said defendant-appellant from the order made and entered in said action on the 30th day of December, 1901, the said order was affirmed by the Appellate Division, First Department, and an order of affirmance thereof was duly entered on the 26th day of
309 May, 1902, and a copy of said order of affirmance, with written notice of entry thereof, was duly served upon Messrs. Jay & Candler, the attorneys for the above named plaintiff-respondent, on the 31st day of May, 1902.

That no copy of said order of affirmance, with written notice of entry thereof, has ever been served upon the above named defendant-appellant or his attorneys, as required by Section 1325 of the Code of Civil Procedure in order to limit the time within which an appeal may be taken therefrom to the

Court of Appeals, and that the time of the said defendant-appellant to appeal from said order has not yet expired. 310

JOHN H. WEBSTER.

Sworn to before me this 16th day of October, 1902.

Charles R. LaRue,
Notary Public,
New York County.

Affidavit of Thomas P. Wickes.

311

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff-Respondent,

against

WILLIAM B. WETMORE,
Defendant-Appellant.

312

State of New York, County of New York, } ss.:

Thomas P. Wickes, being duly sworn, says, that at the time of the making of the motion, the argument of the appeals and the bankruptcy proceeding hereinafter referred to he was of counsel for the above named appellant, William B. Wetmore, and that he had charge of the said several proceedings.

That an appeal was taken by the said appellant from an order made by Mr. Justice Scott at a Special Term of the Supreme Court, for New York

313 County, on the 30th day of December, 1901, denying a motion made by said appellant for an order enjoining and restraining the plaintiff and her attorneys from taking any proceedings for the collection of certain arrears of alimony and allowance for the support and education of the three children of the plaintiff and defendant, under a decree of the Supreme Court for New York County, dated April 1st, 1892.

That the above entitled action was commenced by the plaintiff on or about the 12th day of June, 1890, for the purpose of obtaining an absolute divorce from the defendant, and such proceedings were subsequently had therein, that on or about the 1st day
314 of April, 1892, a judgment was duly entered in said action granting to the plaintiff an absolute divorce and awarding to her the sum of three thousand dollars per year alimony so long as she should live, and in addition the sum of one thousand dollars per year for the maintenance and education of each of the three infant children of the plaintiff and defendant until they should respectively attain the age of twenty-one years, as will more fully appear from the affidavit of said William B. Wetmore upon which the aforesaid motion was based, and which is included in the printed papers on the appeal herein to this court, filed in the office of the
315 Clerk of this Court on the 30th day of April, 1902, and which are hereby referred to and made a part hereof.

That on the 13th day of January, 1899, the said William B. Wetmore was in arrears in the payment of said alimony and allowance under said decree of divorce, the balance alleged to be due to the plaintiff being the sum of $19,221.60.

That on the 13th day of January, 1899, the said William B. Wetmore duly filed in the District Court of the United States, for the Eastern Dis-

trict of Pennsylvania, a petition praying that he 316
be adjudicated a bankrupt, under the provisions of the United States Bankruptcy Act of July 1st, 1898. That the schedules annexed to said petition were verified by said William B. Wetmore on the 28th day of December, 1898, at which time the alleged arrears of alimony and allowance amounted to $17,399.37, which claim was duly set forth in said schedules, but the statement thereof did not include the installment of alimony and allowance falling due on January 1st, 1899. That the respondent above named had due notice of the said proceedings in bankruptcy, and appeared therein. That such proceedings were thereafter duly had in 317
said Court, that on the 21st day of June, 1900, an order was duly made and entered in said Court discharging said William B. Wetmore from all his debts, excepting such as were by law excepted from the operation of a discharge in bankruptcy, as will more fully appear from the copy of said order included in the aforesaid printed papers.

That thereafter and on the 24th day of December, 1901, upon notice duly given to the attorney for the appellant herein, a motion was made in the above entitled action, by the defendant therein, at a Special Term, Part I, for an order enjoining and restraining the plaintiff therein or her attorneys from issuing execution upon the said judgment of 318
April 1st, 1892, or if execution had been issued, from enforcing the same in any way, for the collection of such arrears of alimony and allowance, and from collecting or attempting to collect the said judgment, so far as relates to such arrears, or from instituting any proceeding in said action or any action or actions founded upon claims for such arrears of alimony and allowance, and perpetually enjoining and staying all proceedings in said action or any other action founded upon such arrears

or upon any cause of action arising therefrom, the said motion being made upon the ground that said arrears of alimony and allowance were not within one or any of the classes of debts specified in said Bankruptcy Act as excepted from the operation thereof, but were a fixed liability, as evidenced by a judgment, and that such arrears, or some part thereof, were discharged by the aforesaid discharge of the defendant in bankruptcy.

That by the aforesaid order of Mr. Justice Scott, made and entered the 30th day of December, 1901, the said motion was denied, such decision being made upon the authority of previously decided cases, holding that such arrears were not discharged by a discharge in bankruptcy, as will appear from the memorandum decision included in said printed papers on appeal herein.

That the defendant duly appealed from the said order to this Court, which, on the 26th day of May, 1902, duly affirmed the said order of the Special Term, without any opinion.

That no order of affirmance with notice of entry thereof was ever served on the defendant-appellant or his attorneys, but as it was the desire of the defendant-appellant that the question of law involved in said appeal should promptly be heard by the Court of Appeals, the attorneys for the appellant, the firm of Hatch & Wickes, of which deponent was a member, served a copy of said order of affirmance on the attorneys for the respondent on the 31st day of May, 1902, and on the same day served a notice of appeal from said order of affirmance on said attorneys.

That the said appeal so taken was submitted in the Court of Appeals on the 11th day of June, 1902, and on June 27th, 1902, was dismissed on the ground that the Court of Appeals had not jurisdiction of said appeal.

That the appeal was taken from said order of affirmance without application to this Court for an allowance thereof, as in the opinion of deponent and the attorneys for said appellant, the order was appealable to the Court of Appeals within the provisions of subdivision one of Section 190 of the Code of Civil Procedure. 322

That the question of law involved in said appeal is a Federal question, arising under the United States Bankruptcy Act of July 1st, 1898, and in order that such question may be brought by appellant before the United States Supreme Court for review, in case the relief for which he prays should be finally denied him in the Courts of this State, it is necessary that he should obtain a decision thereon from the highest Court of this State in which a decision thereof may be had. 323

That under the decision of the Court of Appeals dismissing the said appeal, it is necessary, in order to obtain a decision of the Court of Appeals upon the question of law involved, that the appeal herein should be allowed by this Court and that the said question of law should be certified by this Court to the Court of Appeals for review.

That the decision of this Court was rendered too late for an application of this character to have been made to this Court at the May Term thereof. That the appeal taken as aforesaid was prosecuted with the greatest diligence, and the decision of the Court of Appeals dismissing said appeal was rendered, as above stated, on June 27th, 1902, too late for this application to be made to the June Term of this Court, and the application is made to the first term of this Court at which the motion could be made, following the said decision by the Court of Appeals. 324

The question of law involved is one which, in the opinion of deponent, should be reviewed by the

325 Court of Appeals, for the reason that such question has not been passed upon by the Court of Appeals under the present Bankruptcy Act, that the decisions of the United States Courts in relation thereto are conflicting, while there are several decisions of the District Courts of the United States in favor of the contention of the appellant (*In re* Houston, 94 Fed., 119; *In re* Van Orden, 96 Fed., 86; *In re* Challoner, 98 Fed., 82). It is submitted therefore that the appellant should be allowed an opportunity to present the question to the Court of Appeals, for an order to obtain a writ of error from the United States Supreme Court, in case of an adverse decis-
326 ion finally in this State, it is necessary to show that either the highest Court of the State has passed upon the question or refused to entertain jurisdiction of an appeal.

The appellant therefore desires that this Court allow an appeal herein from the said order of affirmance of May 26th, 1902, and certify to the Court of Appeals for review the question of law involved herein, namely: Was the claim of the plaintiff for arrears of alimony and allowance, under the decree of divorce in the above entitled action, which accrued prior to the filing of his petition in bankruptcy by the defendant, or any part thereof, extinguished by his discharge in bankruptcy?

327 Thomas P. Wickes.

Sworn to before me this 16th day of October, 1902.

Banton Moore,
Notary Public,
New York County.

Affidavit of Flamen B. Candler in Opposition to Motion.

327a

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

ANNETTE B. W. WETMORE, now Annette B. Markoe,
Plaintiff-Respondent,

against

WILLIAM B. WETMORE,
Defendant-Appellant.

327b

State of New York, }
County of New York, } ss.:

Flamen B. Candler, being duly sworn, says that he is one of the attorneys and counsel for the plaintiff and respondent in the above entitled action.

Deponent further says that as counsel for the said plaintiff and respondent, on the 11th day of June, 1902, he argued the appeal herein referred to in the affidavit made on this present motion by Thomas P. Wickes, verified on the 16th day of October, 1902, and that on the 27th day of June, 1902, the judgment of the Court of Appeals was handed down dismissing the said appeal with costs.

327c

Deponent further says that hereunto annexed is a copy of the printed points used by deponent on the argument of the said appeal, and that the first point made by deponent as appears by the annexed

327d printed points, was that the order of the Appellate Division of the Supreme Court was not appealable to the Court of Appeals, as it was not an order finally determining an action or special proceeding, nor was it an order granting a new trial on exceptions, which proposition deponent understands was supported by the citations made under the said first point, namely Code of Civil Procedure Section 190; Van Arsdale v. King, 155 N. Y., 325; Hammond v. National Life Association 168 N. Y., 262.

Deponent further says that it nowhere appears in the said printed points that the point was made
327e that the Court of Appeals did not have jurisdiction to entertain the said appeal because leave to appeal to that Court had not been obtained from the Appellate Division of the Supreme Court, and deponent does not understand that the said appeal to the Court of Appeals was dismissed because of the absence of such leave.

Deponent further says that from a perusal of the said annexed printed points and the cases cited thereon, it will appear that the question which the appellant desires to have the Court of Appeals and the United States Supreme Court pass upon has already been passed upon by this Court and by those Courts adversely to the appellant
327f and in this connection special reference is made to the following cases showing that the said questions have already been passed upon against the said appellant, namely:

Maisner v. Maisner, 62 App. Div., 286
Audobon v. Shefeldt, 181 U. S., 575.
People *ex rel.* Buckel v. Gell, 65 N. Y., Supp., 522.
In re Shepard, 97 Fed., 187.
In re Anderson, 97 Fed., 321.
Turner v. Turner, 108 Fed., 785.
Young v. Young, 35 Misc., 355.
In re Lachemeyer, 1 Nat. Bk. Rep., 270.

Deponent further says in view of the facts above mentioned, and of the further facts that the defendant has disregarded the requirements made of him in the judgment for divorce herein in that in violation of the provision of the said judgment, he has re-married and in violation of the said judgment he has not given either of the two bonds for Twenty-five thousand dollars as required by the said judgment, notwithstanding he has been abundantly able so to do, and of the further fact that he has never voluntarily paid one cent for alimony or for the maintenance and education of his three infant children, notwithstanding he has been abundantly able to do so and has since filing his petition in bankruptcy become possessed of a large fortune upon the death of his mother, that no favor should be granted to the said appellant, and this Court should not at this late day grant the present application and put it in the power of this appellant to continue this controversy and subject the respondent to the necessity of following him in his appeals to the Court of Appeals and from thence to the United States Supreme Court. 327g 327h

FLAMEN B. CANDLER.

Sworn to before me this 23d day of October, 1902. 327i

John H. Bogardus,
Notary Public,
Kings County.

Certificate filed in New York County.

327j NEW YORK COURT OF APPEALS.

ANNETTE B. W. WETMORE (now Annette B. Markoe), Respondent,

against

WILLIAM B. WETMORE, Appellant.

Respondent's Points.

This is an appeal from an order of the Appellate Division of the Supreme Court, First Department,
327k on May 23, 1902 (fols. 272 to 284), which affirmed a Special Term order of the Supreme Court made in this action, dated December 30, 1901, which denied the defendant's motion to enjoin the plaintiff from issuing execution upon her judgment of divorce, dated April 1, 1892, and to restrain her from enforcing the same in any way for collection of arrears of alimony and allowance for the maintenance and education of her three infant children under the same judgment, which arrears amounting to $19,221.60, accrued before January 13, 1899, the date of the filing of a petition in bankruptcy by the defendant, and to enjoin her from collect-
3271 ing or attempting to collect the said amount of arrears or from instituting any proceeding in this action or any action or actions founded upon claims for arrears of alimony or for arrears for the maintenance and education of the said children, and to perpetually enjoin and stay all proceedings in this action or any other action founded upon such arrears or upon any cause of action arising therefrom upon the part of the plaintiff or her attorneys or agents or on the part of any person or corporation acting for the plaintiff or her attorneys or agents (fols. 2-4, 265-271).

On April 1, 1892, the plaintiff obtained a judgment 327
of the Supreme Court in this action for absolute divorce against the defendant, which judgment required him to pay to her $3,000 annually as alimony, and also $3,000 annually, being $1,000 annually for each of the three children, issue of the marriage, whose custody was awarded to the plaintiff, for their maintenance and education, during the minority of each of them; and the defendant was also required by the judgment to give two bonds each for $25,000, one to secure the payment of the alimony and one to secure the payment of the amount required to be paid for the maintenance and education of his three infant children (fols. 43 to 58). He has never given either of those two bonds; 327a
he has never voluntarily paid a dollar for alimony or for the maintenance and education of either of his three children, and he has kept himself continuously without the jurisdiction of the Court, and in disregard of the provisions of the said judgment he shortly after its entry married again (fols. 61 to 67; 86 to 89). The unpaid accrued alimony, including the sums awarded for the maintenance and education of the three infant children, now amounts to upwards of $30,000 (fol. 66). The defendant in his moving affidavit states that he is now able to pay the moneys due under the judgment of divorce, and also states in his affidavit that he desires and 327c
is ready "*to comply with the said judgment of divorce as soon as it shall be declared that my said discharge in bankruptcy has relieved me from the aforesaid arrears*" (fol. 25). The defendant inherited a large fortune from his mother, who died after he had been adjudicated a bankrupt and before his discharge in bankruptcy was granted (fols. 91 and 92).

In April, 1891, the defendant made a motion in this action, which included the same relief asked for

7p on the motion, which resulted in the order which was affirmed by the order now appealed from. After argument before Hon. Francis M. Scott, Justice, at Special Term, that motion was denied by an order dated at Special Term on the 30th day of April, 1901. A copy of that order is printed at folios 265 to 267. On denying that motion the learned Judge reviewed the facts at some length, as fully appears by his opinion then filed.

See Wetmore vs. Wetmore, 34 Misc. Rep., 640.

It also appears that in the bankruptcy proceed-
7q ings no claim for alimony or for the maintenance and education of the three infant children was proved (fol. 72). The plaintiff, however, did prove a claim for the value of certain personal property belonging to her which had been unlawfully converted by the defendant to his own use (fols. 73 to 80).

Besides granting to the plaintiff an absolute divorce from the defendant, the judgment in this action required of him three things:

First.—He was required to pay the plaintiff three thousand dollars a year alimony, in quarterly payments, and three thousand dollars a year for the
7r maintenance and education of the three infant children in quarterly payments.

Second.—He was required to give two bonds, each for twenty-five thousand dollars, with surety, one as security for the payment of the alimony and the other as security for the payment of the annual sums awarded for the maintenance and education of the three infant children.

Third.—He was required to refrain from marrying during the life of the plaintiff (fols. 43 to 58).

First.—He has never voluntarily paid one cent for alimony or for the maintenance and education of the three infant children, notwithstanding he swears that he is abundantly able to make the payments as required by the judgment (fols. 86, 91). 327

Second.—He has never given either of the two bonds, although he is perfectly able to do so (fols. 86, 91).

Third.—In violation of the decree of the Court, he has married again (fol. 87).

Under these circumstances he made the motion which resulted in the order which was affirmed by the order now appealed from, and he asks this Court to sustain his appeal and give him the relief which the Supreme Court refused him. 327

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327v

FIRST POINT.

The order of the Appellate Division of the Supreme Court is not appealable to this Court as it is not an order finally determining an action or special proceeding, nor is it an order granting a new trial on exceptions.

Code of Civil Procedure, Section 190.
Van Arsdale v. King 155 N. Y., 325.
Hammond v. Natl. Life Asso., 168 N. Y.,
327w 262.

SECOND POINT.

The defendant being in contempt is entitled to no consideration, and is not in position to ask for the relief now sought on this present appeal.

Wetmore *v.* Wetmore, 34 Misc. Rep., 649; Opinion of Scott, *J.*
Wetmore *v.* Wetmore, 162 N. Y., 512; Opinion of Bartlett, *J.*

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THIRD POINT.

Neither the claim for alimony nor for maintenance and education of the infant children was a debt provable in bankruptcy, and the discharge in bankruptcy did not relieve the defendant from payment of arrears of alimony or arrears for the maintenance and education of the infant children.

Maisner *v.* Maisner, 62 App. Div., 286.
Audubon *v.* Shefeldt, 181 U. S., 575.
People *ex rel.* Buckel *v.* Gell, 65 N. Y. Supp., 522.
In re Shepard, 97 Fed., 187.
In re Anderson, 97 Fed., 321.
Turner *v.* Turner, 108 Fed., 785.
Young *v.* Young, 35 Misc., 335.
In re Lachemeyer, 1 Nat. Bk. Rep., 270.

The points of the learned counsel for the appellant in the Court below contained these remarks:

"The following authorities are in favor of the defendant's present position and contention:

"*In re* Houston, 94 Fed., 119.
"*In re* Van Orden, 96 Fed., 86.
"*In re* Challoner, 98 Fed., 82.

"It must be frankly admitted, however, that other decisions are adverse to the defendant's contention.

"Judge Brown in the U. S. District Court for the Southern District of New York, has held, in substance, that a claim for alimony, whether accrued before or after the commencement of bankruptcy proceedings, was not a provable debt, and was not barred by a discharge."

"*In re* Anderson, Fed. Repr., 321."

7bb "To substantially the same effect is a recent decision of this Court (Maisner *v.* Maisner, 62 App. Div., 286)."

"And the Supreme Court of the United States has also held to the same effect (Audubon *v.* Schufeldt, 181 U. S., 575)."

"It is believed, however, that each one of these decisions may be distinguished from the case at bar.

* * * * * *

"In the case at bar, it will be borne in mind that the arrears of alimony, &c., had been evidenced by a docketed judgment (244-246)."

7cc "And in Wetmore *v.* Wetmore, *supra*, it was declared by our Court of Appeals, concerning this very defendant, 'and from that time on, he is, in effect, a debtor owing his wife the amount adjudged and determined by the decree' (149 N. Y., at p. 528)."

In reply we may add that the cases cited by the appellant's counsel above, namely: 94 Fed., 119; 96 Fed., 86; 98 Fed., 82, have been disapproved by the United States Supreme Court in the case of Audubon *vs.* Schufeldt, 181 U. S., 575, *supra*.

And we also remark that the judgment as docketed was for only $4,500, being for the three installments for the nine months, which first accrued after
7dd the entry of the judgment of divorce on April 1, 1892, and that sum of $4,500 was paid from the judgment in the sequestration action long before the filing of the petition in bankruptcy.

In the sequestration action the plaintiff received about $3,500 per annum until the judgment in that action was modified under the decision of this Court in

Wetmore *v.* Wetmore, 149 N. Y., 520.
Same *v.* Same, 162 N. Y., 503.

So when the bankruptcy proceedings were instituted the plaintiff had no *docketed* judgment for $4,500, or for any other amount. Hence there is nothing in the claim of the appellant that a judgement for alimony *docketed* is provable in bankruptcy.

Fourth Point.

The judgment of divorce having become final, no appeal therefrom being pending, and having been entered prior to the present provisions of Section 1759 of the Code of Civil Procedure as amended, the Court cannot now modify the provisions of the said judgment of divorce in regard to alimony or the amount to be paid for the maintenance and education of the three infant children.

Walker *v.* Walker, 155 N. Y., 77.
Johns *v.* Johns, 44 App. Div., 533.

As the Court could not directly modify the judgment, it should not in effect modify it in favor of a person who is flagrantly in contempt of Court. Even though the Court had power to modify the judgment, still the defendant was not entitled to the order for which he applied when his motion was denied, because he had not done the preliminary things required by the Code of Civil Procedure, viz., by Section 1759 as amended in 1900, before he made his motion; he simply made his motion on papers which were served with a notice of motion, and he did not before doing so obtain leave of the Court to make the motion as required by the amendment under that section.

Section 1759 of the Code of Civil Procedure provides that in certain cases application may be made

to the Court to vary the amount of alimony, &c., and then provides as follows:

"But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the Court, by order made upon or without notice, as the Court in its discretion may deem proper after presentation to the Court of satisfactory proof that justice requires that such application should be entertained."

Fifth Point.

The motion was properly denied, because it was a renewal without obtaining leave of the Court of a previous motion which had also been denied, and such leave is always necessary before a motion can be made a second time.

See folios 90 to 94, 97 to 109.

Wetmore *v.* Wetmore, 34 Misc., 640.

Schultze *v.* Rodewald, 1 Abb. New Cases, 365.

Worman *v.* Frankish, 32 N. Y. State Rep., 235.

Howell *v.* Mills, 53 N. Y., 322.

It appears from the record at folios 90, 97–10, 9 that the motion was made for various kinds of relief, including that applied for in the motion which resulted in the order which was affirmed by the order now appealed from.

At folio 97, *et seq.*, it appears from an order made in this action and in the sequestration action so-called, dated at Special Term, on the 30th day of April, 1901, Honorable Francis M. Scott, Justice, presiding, being the same Justice who made the order which was affirmed by the order now appealed from, that the defendant applied to the Supreme Court to enjoin the plaintiff from enforceing her judgment as regards accumulations of

alimony and of moneys due for the maintenance and education of the three infant children which accrued prior to January 13, 1899, the date of the filing of the petition in bankruptcy by the defendant (fols. 103–109).

It is manifest from the record (see fol. 91) that the defendant does not expect to succeed in this Court on his present appeal, but hopes in some way to succeed in the United States Supreme Court by distinguishing this case from the previous adjudications of that Court on the subject, which as they now stand, are all adverse to him.

SIXTH POINT.

The appeal should be dismissed or the order appealed from should be affirmed with costs.

Dated June 9, 1902.

Respectfully submitted,

JAY & CANDLER,
Attorneys for Respondent,
48 Wall Street,
New York City.

FLAMEN B. CANDLER,
Of Counsel.

Order denying motion for leave to go to Court of Appeals. 328

At a Stated Term of the Appellate Division of the Supreme Court, First Department, held at the Court House thereof in the County of New York on the 7th day of November, 1902.

Present—Hon. CHARLES H. VAN BRUNT,
Presiding Justice.
" EDWARD PATTERSON,
" GEORGE L. INGRAHAM,
" EDWARD W. HATCH,
" FRANK C. LAUGHLIN, Justices. 329

ANNETTE B. W. WETMORE (now Annette B. Markoe),
Plaintiff-Respondent,

against

WILLIAM B. WETMORE,
Defendant-Appellant.

The defendant, William B. Wetmore, having moved for an order allowing him to appeal to the Court of Appeals from the order of affirmance made in this action by this court on the 26th day of May, 1902, affirming the order made at Special Term, Hon. Francis M. Scott, Justice presiding, dated the 30th day of December, 1901, and for a certificate by this court under the provision of Subdivision 2 of Section 190 of the Code of Civil Procedure of the following question for review by the Court of Appeals: 330

331 "Was the claim of the plaintiff for arrears "of alimony and allowance under the decree of "divorce in the above entitled action which ac- "crued prior to the filing of his petition in bank- "ruptcy by the defendant or any part of said "claim extinguished by his discharge in bank- "ruptcy?" and

for such other and further relief as to the Court should seem proper. Messrs. Hatch & Wickes, attorneys for the appellant, having been heard in support of the motion, and Messrs. Jay & Candler, attorneys for the respondent, in opposition, now on reading and filing the notice of motion for the said
332 order, dated October 16th, 1902, and the affidavits thereto annexed of Thomas P. Wickes and John H. Webster, duly verified on the 16th day of October, 1902, and the affidavit of Flamen B. Candler, verified on the 23d day of October, 1902, in opposition, and after due deliberation and upon motion of Jay & Candler, attorneys for the plaintiff-respondent,

Ordered, that the said motion be and the same is hereby denied with Ten dollars costs to be paid by the said defendant-appellant to the said plaintiff-respondent or to her said attorneys.

A Copy.

Alfred Wagstaff, Clerk,

333 Appellate Division, Supreme Court, First Department.

(L. S.)

State of New York, }
County of New York, } ss.:

I, Alfred Wagstaff, Clerk of the Appellate Division of the New York Supreme Court, for the First Judicial Department, do hereby certify that I have compared the preceding copy of notice of motion, affidavits and order denying motion with

the original of such papers on file in my office, and that the same are correct transcripts therefrom and of the whole of such originals. 334

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal this day of April, 1903.

[769]

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Supreme Court of the State of New York, County of New York.

ANNETTE B. W. WETMORE (Now Annette B. Markoe), Plaintiff, *against* WILLIAM B. WETMORE, Defendant.	Petition for Writ of Error to the Supreme Court of the State of New York.

To the Hon. Rufus W. Peckham, associate justice of the Supreme Court of the United States:

Comes now the above named defendant, by his attorneys, Hatch, Keener & Clute, and complains that in the record and proceedings had herein upon the application of the defendant for the injunctive relief prayed for upon his application herein, and in the making of the order of the New York supreme court, appellate division, for the first judicial department on the 26th day of May, 1902, denying to the defendant the said injunctive relief, manifest error has happened to the prejudice of the defendant, as will more fully appear from the assignment of errors submitted herewith.

The said decision of the appellate division was made in an application by the defendant to the special term of the New York supreme court on December 24th, 1901, upon due notice to the plaintiff, for a perpetual stay of execution and of all proceedings upon a judgment in the above entitled action, awarding to the plaintiff certain sums by way of alimony and allowance.

The action was commenced by the plaintiff in the New York supreme court on or about June 12th, 1890, and a decree was entered therein on or about April 1st, 1892, granting to the plaintiff an absolute divorce, and by way of alimony the sum of $3,000 per annum, and also directing the payment to the plaintiff by the defendant of the sum of $1,000 annually for the maintenance and education of each of the three children of the plaintiff and defendant until they should respectively attain the age of twenty-one years (fols. 17–19, 43–58). There was not reserved in the decree any right of subsequent modification or alteration (fols. 43–58).

On November 22, 1894, the plaintiff was married to Dr. James Wright Markoe, a prominent physician in New York city (fol. 20).

Payments on account of the alimony and allowance thus granted were made to the plaintiff from time to time from the income of a trust fund of $100,000 sequestered in an action brought by the plaintiff (fol. 64). On January 13th, 1899, there was alleged to be due to the plaintiff from the defendant under the judgment of divorce, for arrears of alimony and allowance, the sum of $19,221.60 (fols. 21–22). On that date the defendant, on his petition duly made to the district court of the United States for the eastern district of Pennsylvania, was adjudicated a bankrupt, under the bankruptcy act of July 1st,

1898 (fols. 14, 32–34). The arrears, with the exception of $1,500 which became due on January 1st, 1899, were included in the bankrupt's schedules (fol. 22).

The plaintiff received due notice of various steps in the bankruptcy proceeding, appeared therein and opposed the defendant's discharge, not proving her claim for alimony and allowance, but setting up another claim. On June 21st, 1900, an order was made by the district court, discharging the defendant from all debts and claims made provable by the bankruptcy act, and which existed on January 13th, 1899. The plaintiff appealed from the order, and her appeal was dismissed on April 30th, 1901 (fols. 16, 38–39).

On December 19th, 1901, the defendant served on the plaintiff's attorneys notice of this application to the supreme court for an order enjoining and restraining the issuing of execution upon the judgment herein, for the collection of the aforesaid arrears, or the taking of any proceedings for the collection of said arrears or enforcing the said judgment in any way so far as it related to such arrears. (Fols. 6–9.)

On December 30th, 1901, the motion was denied by Mr. Justice Scott (fols. 265–270), and from his decision the defendant appealed to the appellate division of the supreme court, for the first judicial department, which, on May 26th, 1902, affirmed the order of Mr. Justice Scott (fols. 274–'7).

The defendant appealed to the court of appeals from the decision of the appellate division, which, on June 27th, 1902, dismissed the appeal for want of jurisdiction (fols. 286–291, 321, 327*b*–327*e*). The defendant then, his time to appeal not having expired (fols. 307–310) applied to the appellate division on October 24th, 1902, for leave to take an appeal to the court of appeals, and for the certification by the appellate division to the court of appeals, for its decision thereon, of the following question:

"Was the claim of the plaintiff for arrears of alimony and allowance, under the decree of divorce in the above entitled action, which accrued prior to the filing of his petition in bankruptcy by the defendant, or any part of said claim, extinguished by his discharge in bankruptcy?"

(Fol-. 330–334.) The application was denied by the appellate division on November 7th, 1902 (fols. 330–334).

The defendant, in order to obtain a review by this court of the question involved, as arising under a statute of the United States, applies for a writ of error directed to the New York supreme court, for New York county, as the highest court of said State in which a decision on the application may be had by the defendant.

That in the record and proceeding in said cause upon the application of the defendant for the injunctive relief hereinbefore referred to, certain errors were committed, all of which will more fully appear by reference to an assignment of errors which is hereto annexed marked "Exhibit A" and made a part hereof,

W. A. K.

Wherefore this petitioner prays that a writ of error may issue in this behalf to the said supreme court of the State of New York for the correction of the errors complained of, in accordance with the provisions of section 709 of the United States Revised Statutes, and that such other orders and process may issue as may cause the said errors to be corrected by the said supreme court of the State of New York.

Dated, April 30th, 1903.

HATCH, KEENER & CLUTE,
Attorneys for Petitioner.

EXHIBIT A.

Supreme Court of the State of New York, County of New York.

ANNETTE B. W. WETMORE (NOW ANNETTE B. Markoe), Plaintiff,
against
WILLIAM B. WETMORE, Defendant.

Error to the Supreme Court of the State of New York.

Assignment of Errors.

Comes now the defendant William B. Wetmore, and in connection with his petition for a writ of error, makes the following assignment of errors which have occurred upon his application for a stay of proceedings herein:

I.

The appellate division of the New York supreme court, for the first department, erred in affirming, by its order of May 26th, 1902, the order of the special term of said court made and entered in the above entitled action on December 30th, 1901.

II.

That the said court erred in not reversing said order of December 30th, 1901, and granting to the defendant the injunctive relief prayed for upon his application herein, or some part thereof.

III.

That the said court erred in deciding that the defendant was not entitled to an order perpetually enjoining and restraining the plaintiff and her attorneys from taking any proceedings to in any way enforce the collection of the arrears of alimony and allowance which had accrued and become due to the plaintiff from the defendant on or prior to the 13th day of January, 1899, under the judgment entered herein on April 1st, 1892, or any part of such arrears, or to

collect the judgment in the above entitled action so far as it related to such past due alimony and allowance.

IV.

That the said court erred in not deciding that the defendant was entitled to such injunctive relief as to such arrears and judgment, or some part of such relief.

V.

That the said court erred in deciding that such arrears of alimony and allowance were not a provable debt within the intent and meaning of the bankruptcy act of July 1st, 1898, and in not deciding that such arrears were a debt which could be proved against the estate of the bankrupt.

VI.

That the said court erred in deciding that the discharge of the defendant under the bankruptcy act of July 1st, 1898, did not release the amount owing by the defendant to the plaintiff for such arrears of alimony and allowance or any part thereof.

VII.

That the said court erred in not deciding that the discharge of the defendant under the bankruptcy act of July 1st, 1898, released the amount owing by the defendant to the plaintiff for such arrears of alimony and allowance, or some part thereof.

Dated, April 29th, 1903.

HATCH, KEENER & CLUTE,
Attorneys for Petitioner.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Annette B. W. Wetmore (now Annette B. Markoe), plaintiff, and William B. Wetmore, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the

decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of May, in the year of our Lord one thousand nine hundred and three.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
(Signed) R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] U. S. Supreme Court Annette B. W. Wetmore now Annette B. Markoe plaintiff against William B. Wetmore defendant Writ of error Hatch & Wickes att'ys for defendant To justice of the supreme court State of New York Thos. L. Hamilton Esq. clerk Received May 23, 1903

U. S. Supreme Court.

ANNETTE B. W. WETMORE (Now ANNETTE B. Markoe)
ag'st
WILLIAM B. WETMORE.
} Affidavit of Service.

STATE OF NEW YORK, }
County of New York, } *ss*:

George C. Lay, of the city of New York, being duly sworn, says that he is 21 years of age and upwards, and that on the 23d day of

May in the year one thousand nine hundred and three he personally served a copy of the annexed writ of error on the justices of the supreme court of the State of New York by delivering to and leaving with the deputy county clerk of the county of New York a true copy thereof, at the same time showing the annexed original.

GEORGE C. LAY.

Sworn to before me, this 25th day of May 1903.

[Seal of Charles R. La Rue, Notary Public, New York County.]

CHARLES R. LA RUE,
Notary Public, New York County.

[Endorsed:] Affidavit of service.

U. S. Supreme Court.

ANNETTE B. W. WETMORE (Now ANNETTE B. Markoe)
ag'st
WILLIAM B. WETMORE.
} Affidavit of Service.

STATE OF NEW YORK, *County of New York,* } *ss:*

George C. Lay of the city of New York being duly sworn, says that he is 21 years of age and upwards, and that on the 25th day of May in the year one thousand nine hundred & three he personally served a copy of the annexed writ of error on Jay & Candler, att'ys for plaintiff in this action at No. 48 Wall St. in the city of New York by delivering to and leaving with Flamen B. Candler, one of said firm of attorneys a true copy thereof, at the same time showing the original.

GEORGE C. LAY.

Sworn to before me, this 25th day of May 1903.

[Seal of Charles R. La Rue, Notary Public, New York County.]

CHARLES R. LA RUE,
Notary Public, New York County.

[Endorsed:] Affidavit of service.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before

you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Annette B. W. Wetmore (now Annette B. Markoe), plaintiff, and William B. Wetmore, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in *favor of such their validity*; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of May, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] U. S. Supreme Court. Annette B. W. Wetmore now Annette B. Markoe plaintiff ag'st William B. Wetmore defendant. Writ of error. Hatch Keener & Clute att'ys for defendant 100 Broadway New York city.

[Endorsed:] U. S. Supreme Court. Annette B. W. Wetmore (now Annette B. Markoe), plaintiff, against William B. Wetmore, defendant. Writ of error. Hatch, Keener & Clute, attorneys for defendant, 100 Broadway, New York city.

U. S. Supreme Court.

ANNETTE B. W. WETMORE (now ANNETTE B. Markoe)
against
WILLIAM B. WETMORE.
} Affidavit of Service.

STATE OF NEW YORK, *County of New York,* } ss:

George C. Lay of the city of New York being duly sworn, says that he is 21 years of age and upwards, and that on the 25th day of May in the year one thousand nine hundred & three he personally served a copy of the annexed bond on Jay & Candler att'ys for plaintiff in this action, at No. 48 Wall St. New York by delivering to and leaving with Flamen B. Candler one of said firm of attorneys a true copy thereof. at the same time showing the original

GEORGE C. LAY.

Sworn to before me, this 25th day of May 1903

[Seal of Charles R. La Rue, Notary Public, New York County.]

CHARLES R. LA RUE,
Notary Public, New York County.

[Endorsed:] Affidavit of service.

Know all men by these presents, that Fidelity & Deposit Company of Maryland, is held and firmly bound unto Annette B. W. Wetmore (now Annette B. Markoe) in the full and just sum of five hundred dollars, to be paid to the said Annette B. W. Wetmore (now Annette B. Markoe) her certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of May, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a stated term of the appellate division of the supreme court of the State of New York for the first judicial department on the 26th day of May, 1902, in a suit depending in said court, between Annette B. W. Wetmore (now Annette B. Markoe) and William B. Wetmore an order was duly entered, affirming an order of the special term of said supreme court entered on the 30th day of December 1901 denying a motion of said Wm. B. Wetmore for an injunction, restraining collection of and staying proceedings and actions upon arrears of alimony and support allowance accruing on or before January 13, 1899, and thereby a final order of the

State court was rendered against the said William B. Wetmore, and the said William B. Wetmore having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said final order in the aforesaid suit, and a citation directed to the said Annette B. Markoe (formerly Annette B. W. Wetmore), citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said William B. Wetmore shall prosecute the said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal Fidelity & Deposit Company of Maryland. Incorporated 1890.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By HENRY B. PLATT, *Vice-President.* [SEAL.]
Attest: JAMES R. KINGSLEY, *Attorney-in-fact.* [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

STATE OF NEW YORK, }
County of New York, } *ss:*

On the 18th day of May, in the year 1903 before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the Year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R.

Kingsley, and was subscribed thereto by like order of the board of directors, and in the presence of him the said Henry B. Platt.

[Seal of Ernest L. Hicks, Notary Public, New York County.]

ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"*Resolved*, That in pursuance of section eight hundred and eleven " of the Code of Civil Procedure of the State of New York, Henry B. " Platt, vice-president, or George Sewell Bonner, attorney, or Frank " H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood and " James R. Kingsley, attorneys-in-fact of this company, in the State " of New York, be, and each of them is, hereby authorized and em- " powered to sign, execute and deliver any and all bonds or under- " takings for or on behalf of this company, and to attach thereto the " seal of the corporation, the same to be attested by the said George " Sewell Bonner, attorney of the company, or by either one of the " other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution. Given under my hand and the seal of the company, at the city of New York, this 18th day of May, 1903.

[Seal Fidelity & Deposit Company of Maryland. Incorporated 1890.]

JAMES R. KINGSLEY,
Attorney-in-fact.

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1902.

Resources.		*Liabilities.*	
Real estate	$670,000 00	Capital stock	$2,000,000 00
Stocks and bonds	2,723,100 00	Surplus and undivided profits	2,876,233 57
Railroad bonds	2,059,600 00	Premium reserve	717,297 87
Net premiums due	102,807 25	Claims in process of adjustment	31,012 45
Cash in bank, etc	235,058 63	Claims reported	166,021 99
	$5,790,565 88		$5,790,565 88

STATE OF NEW YORK, } ss:
County of New York, }

James R. Kingsley, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1902, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 18th day of May, 1903.

[Seal of Ernest L. Hicks, Notary Public, New York County.]

ERNEST L. HICKS,
Notary Public, New York County.

[Endorsed:] U. S. Supreme Court Annette B. W. Wetmore (now Annette B. Markoe) plaintiff against William B. Wetmore defendant. Bond on application for writ of error Hatch, Keener & Clute, attorneys for defendant 100 Broadway New York city.

UNITED STATES OF AMERICA, ss:

To Annette B. Markoe (formerly Annette B. W. Wetmore), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York wherein William B. Wetmore is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 19th day of May, in the year of our Lord one thousand nine hundred and three.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] U. S. Supreme Court Annette B. W. Wetmore (now Annette B. Markoe) plaintiff ag'st William B. Wetmore defendant Citation Hatch, Keener & Clute attorneys for defendant 100 Broadway New York city Rec'd May 25 1903 County clerk's office N. Y. Co.

STATE OF NEW YORK, } ss:
County of New York, }

On this twenty fifth day of May, in the year of our Lord one thousand nine hundred and three, personally appeared George C. Lay before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Jay & Candler the attorneys for the defendant & left the same with Flamen B. Candler, one of said firm at his office No. 48 Wall St. New York city

GEORGE C. LAY.

Sworn to and subscribed the 25 day of May A. D. 1903.

[Seal of Charles R. La Rue, Notary Public, New York County.]

CHARLES R. LA RUE,
Notary Public, New York County.

STATE OF NEW YORK, } ss:
County of New York, }

Clerk's office of the supreme court of the State of New York for the county of New York.

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court of the State of New York, for the said county of New York, by virtue of the annexed writ of error which
M. J. D. was served upon me on the twenty-third day of May,
M. J. D. 1903, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 112 inclusive contain a true and complete transcript of the record and proceedings had in said court in the suit Annette B. W. Wetmore (now Annette B. Markoe) against William B. Wetmore mentioned in said writ of error as the same remain of record and on file in my office and that annexed hereto *is* the petition for said writ of error the citation to the writ in error with proof of service of the same, the said writ of error served upon me

M. J. D. In testimony whereof I have caused the seal of the said court to be hereunto affixed at my office in the city and county of New York, on the 27th day of May, 1903

[Seal New York.]

THOS. L. HAMILTON, *Clerk.*

[Endorsed:] U. S. Supreme Court Annette B. W. Wetmore (now Annette B. Markoe) *vs.* William B. Wetmore Return to writ of error. Hatch, Keener & Clute attorneys for petitioner 100 Broadway N. Y. city

Endorsed on cover: File No. 18,970. New York supreme court. Term No. 319. William B. Wetmore, plaintiff in error, *vs.* Annette B. Markoe (formerly Annette B. W. Wetmore). Filed June 10th, 1903.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. [illegible] 52.

WILLIAM B. WETMORE,

Plaintiff-in-Error,

vs.

ANNETTE B. MARKOE (formerly Annette B. W. Wetmore),

Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR

HATCH, KEESER & CLOTH,
Attorneys for Plaintiff-in-Error,
100 Broadway,
Borough of Manhattan,
New York City.

WILLIAM A. KEESER,
Of Counsel.

Supreme Court of the United States.

WILLIAM B. WETMORE,
Plaintiff-in-Error,

against

ANNETTE B. MARKOE (formerly Annette B. Wetmore),
Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement of Facts.

This case is before the court pursuant to a writ of error duly issued on the 19th day of May, 1903, to review an order of the Appellate Division of the Supreme Court of the State of New York, dated and filed May 26, 1902, and the order of the Special Term of said Supreme Court thereby affirmed, dated and filed December 30, 1901, and all the other proceedings of said court at the Appellate Division and Special Term involved therein. The plaintiff-in-error applied for a permanent injunction and a perpetual stay of all proceedings on behalf of defendant-in-error to enforce the collection

of arrears of alimony and allowance prior to January 13, 1899, under a decree of divorce in favor of the defendant-in-error and against the plaintiff-in-error, entered in the Supreme Court on the first day of April, 1902, which application was by said court in all respects denied by the orders above-mentioned.

The application was made on the ground that the plaintiff-in-error had been discharged in bankruptcy and that said discharge operated to release him from such arrears of alimony and allowance (fols. 6-58).

The action in which said application was made was commenced in said Supreme Court, by the defendant-in-error here, against the plaintiff-in-error, on or about June 12, 1890, and on or about April 1, 1892, a decree was entered in said action granting to the plaintiff therein an absolute divorce, and directing the payment to her by the defendant therein of the sum of Three thousand dollars per annum by way of alimony, and the sum of one thousand dollars per annum for the support and maintenance of each of the three children of the parties to said action, during the minority of said children (fols. 43-58).

There was not reserved in said decree any right or privilege of subsequent modification or amendment (fols. 47-58).

On November 22, 1894, the defendant-in-error was married to Dr. James Wright Markoe, a physician in New York City (fol. 20).

Payments on account of the alimony and allowance thus granted the defendant-in-error were made to her from time to time from the income of a trust fund, originally of $100,000, created for the

benefit of the plaintiff-in-error, and sequestered in another action brought in equity by the defendant-in-error to reach the income thereof (fols. 63-66).

On January 13, 1899, there was due to the defendant-in-error from plaintiff-in-error, for arrears of alimony and allowance under said judgment of divorce, the sum of $19,221.60 (fols. 21-22). On that date the plaintiff-in-error, on his petition duly made to the District Court of the United States, for the Eastern District of Pennsylvania, was adjudicated a bankrupt under the United States Bankruptcy Act of July 1, 1898 (fols. 14, 32-34). The arrears above referred to, with the exception of $1,500 which became due January 1, 1899, were included in the schedule filed with said petition (fol. 22).

Defendant-in-error received due notice of the various steps in the bankruptcy proceeding, appeared therein and opposed the bankrupt's discharge, not proving her claim for arrears of alimony and allowance, but setting up another claim (fols. 62, 74-82). On June 21st, 1900, an order was duly made by the said District Court, discharging the plaintiff-in-error from all debts and claims made provable by the said Bankruptcy Act, and which existed on January 13, 1899 (fols. 32-35).

After such discharge, and on or about December 19, 1901, the plaintiff-in-error caused to be served on the attorneys for the defendant-in-error notice of an application to the Special Term of the Supreme Court of the State of New York, for the First Department, for an order enjoining and restraining all proceedings by or on behalf of the defendant-in-error, under said decree of divorce, for the collection of the aforesaid arrears of alimony (fols. 6-9). The application was in all respects de-

nied (fol. 262). The decision of the Special Term was solely on the merits, as appears from the memorandum decision of Mr. Justice Scott, based on cases already adjudicated and claimed to involve the question at issue (fol. 262).

From the order denying the motion the plaintiff in error appealed to the Appellate Division of the Supreme Court, for the First Judicial Department, which appeal resulted in the order of affirmance of May 26, 1902 (fols. 274-277).

The plaintiff in error thereupon appealed to the Court of Appeals, the highest judicial tribunal of the State, but of limited jurisdiction, and on June 27, 1902, his appeal was dismissed for want of jurisdiction without any affirmance or reversal on the merits (fols. 286-291), the defendant in error contending that the order was not appealable under Section 190 of the Code of Civil Procedure of the State of New York, as it was not an order finally determining an action or special proceeding, nor was it an order granting a new trial on exceptions (fol. 327/C-327/D).

The order of the Court of Appeals and the judgment on remittitur were duly made the order and judgment of the Special Term (fols. 292-297).

Before his time to appeal to the Court of Appeals had expired (fols. 307-310) the plaintiff in error applied, on October 24, 1902, to the said Appellate Division for leave to appeal to the Court of Appeals, and for the certification to that court, for decision, of the following question (fols. 301-305):

> "Was the claim of the plaintiff (defendant-in-error) for arrears of alimony and allowance under the decree of divorce in the above entitled action, which accrued prior to the filing

of his petition in bankruptcy by the defendant (plaintiff-in-error) or any part of said claim, extinguished by his discharge in bankruptcy?"

This application was denied on November 7, 1902, upon an argument by the defendant-in-error that the point had already been passed upon by various courts (fol. 327). Further progress in the New York courts was thereby barred under the State laws and procedure (fols. 328-334).

The plaintiff-in-error having therefore applied to the highest court of the State of New York in which he could obtain a decision of the question involved, and deeming himself aggrieved by the action of said court, presented his petition and assignment of errors to this court and obtained the writ of error herein (pp. 118-119).

As a question arising under a statute of the United States is involved, and a right, privilege and immunity claimed by the plaintiff-in-error under his discharge in bankruptcy has been denied, he therefore duly and respectfully presents his grievance to this court for review, to the end that the said orders may be reversed and said errors corrected by the mandate of this court.

Specification of Errors.

The plaintiff-in-error specifies the following assignments of error made upon his application to this court for writ of error, and upon which he will rely in the prosecution of his appeal:

I. The Appellate Division of the New York Supreme Court for the First Department erred in affirming, by its order of May 26, 1902, the order of the Special Term of said court made and entered

on December 30, 1901, and entitled in the action for divorce brought by the defendant-in-error against the plaintiff-in-error in said court.

II. The said court erred in not reversing said order of December 30, 1901, and granting to the plaintiff-in-error the injunctive relief prayed for upon his application herein, or some part thereof.

III. The said court erred in deciding that the plaintiff-in-error was not entitled to an order perpetually enjoining and restraining the defendant-in-error and her attorneys from taking any proceedings to in any way enforce the collection of the arrears of alimony and allowance which had accrued and become due to the defendant-in-error from the plaintiff-in-error on or prior to the 13th day of January, 1899, under the judgment of divorce entered on April 1, 1892, in favor of the defendant-in-error and against the plaintiff-in-error, or any part of such arrears, or to collect the judgment in said action so far as it related to such past due alimony and allowance.

IV. The said court erred in not deciding that the plaintiff-in-error was entitled to such injunctive relief as to such arrears and judgment, or some part of such relief.

V. The said court erred in deciding that such arrears of alimony and allowance were not a provable debt within the intent and meaning of the bankruptcy act of July 1, 1898, and in not deciding that such arrears were a debt which could be proved against the estate of the bankrupt.

VI. The said court erred in deciding that the discharge of the plaintiff-in-error under the bankruptcy

act of July 1, 1898, did not release the amount owing by the plaintiff-in-error to the defendant-in-error for such arrears of alimony and allowance or any part thereof, and in not deciding that the discharge of the defendant under the bankruptcy act of July 1, 1898, released the amount owing by the plaintiff-in-error to the defendant-in-error for such arrears of alimony and allowance, or some part thereof.

FIRST POINT.

Under the statutes and decisions of the State of New York, the claim of the defendant-in-error for alimony and allowance was a fixed liability, evidenced by a judgment.

(*a*) The decree of divorce of April 1, 1892, containing no provision by virtue of which it may be modified, altered or amended, became an absolute obligation, beyond the power or control of either the courts or the legislature to modify.

Walker v. Walker, 155 N. Y., 77.
Livingston v. Livingston, 173 N. Y., 377.

Section 1759 of the Code of Civil Procedure, as it read in 1892, when this decree of divorce was entered, provided that in an action for divorce brought by the wife, the court might, in the final judgment, make provision for the maintenance of the children of the parties and the support of the plaintiff. Subsequently, the section was so modified as to permit either party, upon the permission of the court, to apply for the annulment, variation

or modification of such decree, it was, however, held by the Court of Appeals in the case of Walker v. Walker, 155 N. Y., 77, that such amendment did not apply to any decree entered before its enactment which contained no provision for its subsequent modification. Martin, J., delivering the opinion of the court, referring to this section, said:

> "Under that statute, as well as under the Revised Statutes, after the entry of the final decree establishing the rights of the parties, the court had no power to order an additional allowance for the support of the wife. The jurisdiction of the court over the subject-matter of such an action and of the parties in respect to the matters involved in it, terminated with the entry of final judgment except as to proceedings for the enforcement of it or to correct any mistakes in the record."

A further amendment of the section in 1900 provided that such application for modification might be made in relation to judgments theretofore as well as thereafter entered. The Court of Appeals, in Livingston v. Livingston, 173 N. Y., 377, held that the amendment was unconstitutional so far as it sought to affect judgments theretofore entered, as it would deprive a party of property without due process of law. Mr. Justice Gray, writing the opinion of the court, said:

> "As Mr. Justice Cullen well expressed it, in his dissenting opinion at the Appellate Division, in Walker v. Walker (21 App. Div., 226):
>
> 'The plaintiff prior to the decree had a right of support. By her divorce she lost that right, and in substitution for it she acquired a new right, the judgment requiring the payment to her of a specific sum of money.'

> That right as a vested interest is property which the legislature is powerless to divest her of. If the interest is as it is claimed, an expectant one, being in the sense that the obligation of the defendant was a continuing one to pay alimony in the future, nevertheless the interest was one fixed by the judgment, and was not a mere contingency. It was not a capacity to acquire a right for the payment of money; it was a right fixed by the judgment, and hence vested in the plaintiff."

(*b*) So absolute is this obligation that it is not affected by the marriage of the wife.

> Shepherd v. Shepherd, 1 Hun, 240; affirmed 58 N. Y., 644.

(*c*) It is an obligation collectible by the levying of an execution.

> New York Code of Civil Procedure, Section 1240.
>
> Miller v. Miller, 7 Hun, 208.

Section 1240 of the Code of Civil Procedure, so far as material, provides:

> "In either of the following cases a judgment may be enforced by execution:
>
> "1. Where it is for a sum of money in favor of either party, or directs the payment of a sum of money."

(*d*) The defendant-in-error is regarded as a judgment-creditor.

> Wetmore v. Wetmore, 149 N. Y., 520.

In the case just cited, the defendant-in-error brought an action to sequester the income of a trust fund created for the benefit of the plaintiff-in-

error, to secure the payment of her alimony. The Court of Appeals held that she was entitled to reach the surplus of the trust fund under Section 57 of the Revised Statutes, which provided that an income of a trust in lands beyond what should be necessary for the support, etc., of the beneficiary,

> "shall be liable in equity to the claims of creditors of such persons in such manner as other personal property which cannot be reached by an execution at law."

Mr. Justice Haight, in this case, delivering the opinion of the court, said (see pages 525-528):

> "After the sum of $4,500 of alimony had become due and payable a judgment was entered against him in favor of the plaintiff for that amount, on which an execution was issued and returned unsatisfied. * * * As we have seen, a judgment has been entered in her favor for the alimony that had become due and payable. She is, therefore, as to that amount, a judgment-creditor and entitled to avail herself of all the remedies given by the statute. * * *
>
> "* * * Inasmuch as the judgment entered for alimony past due does not cover all of the alimony that has accrued and is provided for in the judgment entered in this action, it becomes necessary to determine the effect of the judgment in the divorce action, awarding alimony to the plaintiff. * * *
>
> "* * * It will thus be seen that the awarding of alimony is not on account of any prior debt due and owing from the husband to the wife, but it is based upon a duty devolving upon the husband to support her. And that in awarding judgment against him the court determines the amount necessary for such support, and requires the amount so fixed to be paid to her.

> His duty is thus determined. And from that time on he is in effect a debtor, owing his wife the amount adjudged and determined by the decree. Whilst such amount is in effect the property of a wife, yet it being created and protected by a decree, it cannot be reached by prior existing creditors."

It is respectfully submitted, therefore, that in New York, whatever may be the nature of a claim for alimony elsewhere, the decree awarding alimony in this case imposed upon the plaintiff-in-error a fixed liability, evidenced by a judgment. As neither the decree itself nor the statute under which it was entered contained any provision for subsequent modification, the debt created by the judgment is fixed and unalterable, and as to the amounts past due, absolutely owing.

SECOND POINT.

The arrears of alimony which accrued prior to January 13, 1899, were a provable debt within the provisions of the United States Bankruptcy Act, and were released by the discharge in bankruptcy granted to the plaintiff-in-error.

(1) Section 17 of the Bankruptcy Act, prescribing what debts shall be released by a discharge in bankruptcy, read at the time of the filing of the petition of the plaintiff-in-error and the granting of his discharge, as follows:

> "A discharge in bankruptcy shall release a bankrupt from all of his *provable debts*, except such as (1) are due as a tax levied by the

United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretense or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

Clearly the claim for arrears of alimony and allowance is not included within any class of debts excepted from the operation of the statute, and it is equally clear from the language of the Act that all provable debts not explicitly excepted are discharged. The right of the plaintiff-in-error therefore depends upon whether or not the arrears are a provable debt.

Section 1 of the Act defines a "debt" as including "any debt, demand or claim provable in bankruptcy."

Section 63 of the Bankruptcy Act prescribes the classes of debts which may be proved against a bankrupt's estate. The only provision applicable here, at the time the plaintiff-in-error was adjudicated a bankrupt, is as follows:

"Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

Since under the New York law alimony is a fixed liability, evidenced by a judgment, conferring a vested right to enforce payment, it is unquestionably a demand. It seems impossible, therefore, to regard it otherwise than as a debt under the Bankruptcy Act.

That it was the intention of Congress originally to allow a claim for alimony to be proved against the estate of a bankrupt husband seems evident from the recent amendment of the Bankruptcy Act, passed in 1903, which in terms provides that a discharge in bankruptcy shall not operate as a release of alimony due or to become due. If that were already the law, under all circumstances, this amendment was unnecessary and superfluous.

While under Section 63 the classes of debts which are provable remain unchanged, by the amendment to Section 17 the class of provable debts not discharged is enlarged so as to include a claim for alimony. Such a claim is, in terms, exempted as a "provable debt," the wording of the section, so far as material, now being:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities * * * for alimony due or to become due, or for maintenance or support of wife or child. * * *"

All debts now provable were provable prior to the amendment of Section 17, which amendment is a recognition of the fact that claims for alimony were and are still provable under Section 63. The claim of the divorced wife thus being provable, it was clearly discharged by Section 17, as it cannot be contended that until the passage of the amendment of 1903 there was a clause in Section 17 which

would relieve from the operation of said section the claim for alimony if it were provable under Section 63. Congress had expressly excepted certain classes of judgments from the operation of the Act, as set out in Section 17, such as those founded upon wilful and malicious injuries to the person or property of another, fraud, embezzlement, and the like. To except from "provable debts" judgments in actions of such a nature, surely established the judgments as debts provable but not discharged. Whatever the nature of the original claim, by its reduction to judgment it becomes a debt. A person who has committed an assault and battery upon another is no more the debtor of that other than is a husband the debtor of his wife, nor even under any moral obligation to pay exemplary damages for the tort. But it cannot be contended that after judgment had been rendered for such exemplary damages the defendant would not be the debtor of the plaintiff. That Congress so regarded the relation is shown by the fact that it excepted such a judgment from the provable debts that were released by the discharge.

Here also the rule "*Expressio unius est exclusio alterius*" applies. In excluding particular judgments in Section 17 of the Act, it must be assumed that Congress intended to include all others. Decrees respecting alimony being there omitted were impliedly included as provable and discharged.

But whatever may have been the intention of Congress, the plaintiff-in-error is entitled to the benefit of the provisions of the Act as it stood when his petition was filed, which provisions, regarding excepted debts, were surely of more limited effect than those of the Act as now amended.

In Re Houston (94 Fed., 119), decided by the District Court for Kentucky, it appeared that the judgment of divorce was obtained in Kentucky, where a judgment for alimony is of the same nature as in New York State, and the court in its opinion said:

> "And it should not be overlooked that the Court of Appeals of Kentucky, in the case of Tyler vs. Tyler, 99 Ky., at page 34; 34 S. W., 899, in speaking of a judgment against the husband for alimony, said that it 'makes him an ordinary debtor to the wife for a fixed sum of money, that his estate is liable for in the same manner that it would be for a debt upon any contract.'"

In holding that an order of the Bankruptcy Court in that matter, enjoining and staying all proceedings in the State court for the collection of alimony, should be enforced, the District Court said:

> "Section 1 of the act provided that the word 'debt' shall include any debt, demand or claim provable in bankruptcy, and also that the word 'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, subject to the exceptions named in the act. Whether wisely or unwisely, Congress did not, in fact, in Section 63, distinguish between judgments for alimony and other judgments, when including them in the list of provable debts; nor did it, in Section 17, include judgments of that class among those not to be affected by a discharge in bankruptcy."

In Re Van Orden, 96 Fed., 86, related to arrears accrued under a judgment of a New York court awarding a divorce and alimony, and which arrears the wife of the bankrupt sought to enforce

in New Jersey, where the bankrupt had taken up his residence. The United States District Court in New Jersey, in holding that her proceedings should be stayed, said:

> "Section 1 of the Bankrupt Act of 1898 provides that a 'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy except such as are excepted by this act. The debts which are excepted and referred to in Section 1 are to be found specifically set out in Section 17 of this act. It is admitted, and, if it were not, it would be perceived at a glance, that the debt of Mrs. Van Orden is not included in any of the excepted classes. The only question before the court, then, is whether the debt for which Mrs. Van Orden has brought her suit against the bankrupt is one provable in bankruptcy."

After referring to the provisions of the Act as to what debts were provable, the court further said:

> "The support and maintenance of a wife by the husband is an ever-recurring liability from which he cannot by any act of his be freed. It is an obligation founded in law and justice, which may be enforced by action. Until the necessity for its enforcement arises, the extent of this liability is vague and uncertain; but when the aid of the court has been invoked, and it awards alimony, it thereby determines the amount of the husband's liability, and by its judgment or decree requires the amount so fixed to be paid the wife for her maintenance and support. 'From that time the husband is, in effect, a debtor, owing his wife the amount adjudged and determined in the decree' (*Wetmore v. Wetmore*, 149 N. Y., 521; 44 N. E., 170). That which before was a mere liability now becomes a debt. The judgment establishes the indebtedness, and makes fixed and certain

that which was before uncertain, and becomes the evidence of the debt which it creates" (*Black v. McClellan*, 12 N. B. R., 431, Fed. Cas. No. 1462; *Zimmer v. Schleehauf*, 115 Mass., 52; *Crouch v. Gridley*, 6 Hill, 250; *Nicholas v. Dissler*, 31 N. J. Law, 473).

In re Challoner, 98 Fed., 82, it was also held that arrears of alimony are a debt under the bankrupt law. The divorce under which the controversy arose was granted in Illinois, where arrears of alimony are a fixed debt, which cannot be reduced, under the authority of Craig v. Craig, 163 Ill., 176.

It is important to notice in this connection the difference in the language used in the Act of 1867 and that in the Act of 1898. So far as the question here presented is concerned, the Act of 1867 provided:

> "That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. * * * No debts other than those above specified shall be proved or allowed against the estate" (Sec. 19).

The Act left it to be determined by the courts what should constitute a debt within the meaning of the Act. Whereas, the present Act clearly defines a "debt" to be "any debt, demand or claim provable in bankruptcy." Therefore, in Section 63, where the phrase "debts of the bankrupt" is used, the clause should be construed as if reading:

> "Debts, demands or claims against the bankrupt may be proved and allowed against his estate which are a fixed liability as evidenced

> by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him."

The Act of 1867, so far as it referred to all debts due and payable and all demands against the bankrupt that were provable under that Act, raised questions of doubtful construction which were apparently appreciated by Congress when it enacted the Bankruptcy Law of 1898, for under the Act of 1867, Section 19, it was not defined, as in Section 63 of the present Act, that among others of such debts are:

> "(1) A fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition."

Sections 63 and 17 of the present Act must be read together, for it is clear that it is not every fixed liability as evidenced by a judgment which, though provable, is affected by the discharge, but it does clearly appear that all debts which are fixed liabilities as evidenced by a judgment are provable under the present Act.

(2) The exact question here involved has never been passed upon adversely to the contention of the plaintiff-in-error.

The cases in which the general subject has been considered, and which may appear to be in opposition to the contention of the plaintiff-in-error, are the following:

> Dunbar v. Dunbar, 190 U. S., 340.
> Audubon v. Shufeldt, 181 U. S., 575.
> *In re* Lachemeyer, 18 N. B. R., 270.
> *In re* Nowell, 99 Fed., 931.
> Menzie v. Anderson *et al.* (1879), 65 Ind., 239.

Noyes v. Hubbard (1892), 64 Vermont, 302.
Barclay v. Barclay (1900), 184 Ill., 375.
Kerr v. Kerr (1897), 2 Q. B. Div., 439.

In Dunbar v. Dunbar, 190 U. S., 340, no claim was made for the arrears accrued prior to the date when the defendant was adjudged a bankrupt. In an action by the plaintiff to recover arrears accruing under the contract subsequent to that date, the court held that the defendant's discharge in bankruptcy was no defense.

An analysis of the remaining cases discloses that in every one of them, with the exception of Menzie v. Anderson (65 Ind., 239), and Noyes v. Hubbard (64 Vermont, 302) the fact appeared and was made the basis of the decision, that the alimony was not fixed and unchangeable. In the two last mentioned cases the court held that alimony was not a "debt growing out of or founded upon a contract express or implied." It is not contended by plaintiff in error that it is a debt of that character; under the present Act it is not necessary that it should be so regarded; but it is a debt fixed and finally determined by the judgment.

In Audubon v. Shufeldt, it appeared that the judgment of divorce was obtained in Maryland. The bankrupt afterwards took up his residence in the District of Columbia, where he prosecuted his bankruptcy proceedings. The bankruptcy court held that arrears of alimony which accrued prior to the adjudication of bankruptcy were a provable debt. Mr. Justice Gray, delivering the opinion of the Supreme Court reversing the order

granting a discharge covering arrears of alimony, said, at page 577:

> "Generally speaking alimony may be altered by that court at any time as the circumstances of the party may require. * * * In the State of Maryland and in the District of Columbia alimony is granted by a decree of a court of equity (citing the authorities) and as the Court of Appeals of the District of Columbia has more than once said, 'the allowance of alimony is not in the nature of an absolute debt; *it is not unconditional and unchangeable; it may be changed in amount even when in arrears, upon good cause shown to the court having jurisdiction.*'"

And quoting from the opinion in Barclay v. Barclay (184 Ill., 375), Mr. Justice Gray said:

> "The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and not being so cannot be discharged by an order in the bankruptcy court."

In the Lachmeyer case, 18 N. B. R., 270, the leading authority under the Bankruptcy Act of 1867, the decree contained a provision allowing either party to apply to the court for a modification of the decree upon the happening of any event changing the circumstances of the parties (see page 270).

Judge Choate in deciding that a claim for alimony was not a provable debt in bankruptcy, in terms confined his decision to a case where the ali-

mony was not an absolute fixed obligation, basing his decision upon the reservation contained in the decree. In his opinion, at page 272, he says:

> "The weight of authority at present, therefore, clearly is that a positive obligation to pay a certain sum of money, liquidated, and for which an action will lie, though not based upon *contract, nor growing out of contract,* is a provable debt under the present bankruptcy law (referring to the Act of 1867); but these later authorities have given a more extended construction to the word 'debt' under the present bankrupt law than was given to the same word in the law of 1841 by the District Court of Connecticut *in re* Cotton, *ut supra,* where a judgment for seduction was held not provable.
>
> "But the claim for arrears of alimony is in some respects different from any of the obligations held provable in the cases above cited. It is not generally enforceable by action, but by process for contempt. If the obligation to pay the overdue alimony was an absolute obligation and enforceable in a personal action it would seem to be within the cases cited above * * *. It seems, however, that one of the reasons why an action will not ordinarily lie to enforce a decree of alimony is that from the peculiar character of the obligation, the decree is always subject to modification by the court in which the decree was entered according to the varying circumstances of the parties, and that no other court can undertake to administer the relief to which the parties are entitled except the court which has jurisdiction of the original suit. * * * The case as to overdue alimony is not free from doubt, but upon the whole, I am of opinion that it is not a provable debt within the meaning of the bankrupt law *because not an absolute obligation enforceable by action.*"

Judge Lowell, in delivering the opinion *in re* Nowell, 99 Fed. Rep., 931, put his decision distinctly on the ground that alimony was not, in the case before him, fixed and unchangeable. He said (933-934):

> "Is a claim for arrears of alimony which has been decreed by a court of Massachusetts released by a discharge in bankruptcy? As has been said, these arrears are not, prior to the issue of an execution to collect them, a fixed liability absolutely owing; for the amount of the liability may be modified by the court which has decreed the alimony and issues the execution. Even arrears of alimony, therefore, are not a provable debt within the letter of the present bankrupt law, and upon the whole, the decisions concerning alimony and bankrupt laws in general hold alimony not to be provable. * * *
>
> "Under the Act of 1898 have been made several decisions supposed to favor the defendant's contention in this case."
>
> "*In re* Houston (D. C.), 94 Fed., 119, the District Court of Kentucky discharged a bankrupt from an arrest made by order of the State court to enforce the payment of alimony and imposed, and the opinion is devoted to the vindication of the unquestionable authority of the District Court, under proper conditions, to release an individual from arrest by the State Court, and incidentally the court decided that alimony was a provable debt. The decision was based on the authority of Tyler v. Tyler, where it was said that a judgment for alimony 'makes him (the husband) an ordinary debtor to the wife for a fixed sum of money that his estate is liable for in the same manner that it would be for a debt upon contract.'
>
> "If this is the nature of alimony in Kentucky, a claim for arrears of alimony may well be barred by a discharge in bankruptcy, but

this is not the nature of alimony in Massachusetts; *in re* Houston is here inapplicable.

"*In re* Van Orden, 96 Fed., 86, the bankrupt sought to enjoin his wife from prosecuting in New Jersey a suit in equity to recover arrears of alimony decreed by a State Court of New York, and the District Court of New Jersey granted an injunction. In that case the liability was apparently fixed, inasmuch as its enforcement was sought in an independent suit in which no modification of the original decree could be obtained. The decision has therefore no bearing on the present case, although the learned judge doubtless expressed his opinion that arrears of alimony in general are a provable debt."

It is true that in England alimony is not discharged by bankruptcy, but it is for the reason that alimony, whether in arrears or not, is entirely under the control of the court which originally decreed its payment.

Kerr v. Kerr (1897), 2 Q. B., 439, 443-444.

THIRD POINT.

The remedy of plaintiff-in-error was properly sought in the court in which the judgment was entered.

Moore v. Upton, 50 N. Y., 593.
Palmer v. Hussey, 119 U. S., 96.

In Palmer v. Hussey, *supra*, the plaintiff-in-error after his discharge in bankruptcy, applied to the state court for an order perpetually enjoining and restraining the defendant-in-error from enforcing

the judgment previously obtained against him on the ground that it was extinguished by his discharge. The motion was denied at the Special Term, but reversed by the Court of Appeals and the motion granted. On writ of error of the United States Supreme Court that court sustained the order of the Court of Appeals.

FOURTH POINT.

The Appellate Division of the Supreme Court is the highest court of the State of New York in which a decision could be had by the plaintiff-in-error.

The plaintiff-in-error took his appeal originally as a matter of right, and the dismissal by the Court of Appeals, without any consideration of the merits, was a repudiation of its jurisdiction of the appeal. The subsequent refusal of the Appellate Division to certify the question to the Court of Appeals left the plaintiff-in-error without recourse to any court higher than the Appellate Division.

It is held that where a decision cannot be obtained from the highest court of the state, the writ of error should be directed to the lower court rendering the decision.

> Bacon v. Texas, 163 U. S., 207.
> Mo., Kan. & Tex. Ry. Co. v. Elliott, 184 U. S., 530.

The plaintiff-in-error here exhausted every means of obtaining a decision by the Court of Appeals on his application. From the decision of the Appellate Division affirming the order of the Spec-

ial Term, he appealed to the Court of Appeals. That appeal was taken promptly, and was submitted to the Court of Appeals on June 11, 1902, and dismissed by that court on June 27, 1902, and before his time to appeal had expired, he applied to the Appellate Division for leave to appeal to the Court of Appeals, and for the certification to that court by the Appellate Division of the question involved. Upon the refusal of that application plaintiff-in-error could present his application to no higher court of the State.

On the questions of jurisdiction of the Court of Appeals and limitation of time to appeal, the following Sections of the Code of Civil Procedure of the State of New York apply:

> Sec. 190. "* * * From and after the last day of December, 1895, the jurisdiction of the Court of Appeals shall in civil actions and proceedings be confined to the review upon appeal of the actual determinations made by the Appellate Division of the Supreme Court in either of the following cases and no others:
>
> "1. Appeals may be taken as of right to said court from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them.
>
> "2. Appeals may also be taken from determinations of the Appellate Division of the Supreme Court in any department where the Appellate Division allows the same and certifies that one or more questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals in which case the appeal brings up for review the question or questions so certified and no other; and the Court of

Appeals shall certify to the Appellate Division its determination upon such question."

Section 191. "* * * The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

"1. No appeal shall be taken to said court in any civil action or proceeding commenced in any court other than the Supreme Court, Court of Claims, County Court or a Surrogate's Court unless the Appellate Division of the Supreme Court allows the appeal by an order made at the term which rendered the determination or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

"2. * * *

"3. The jurisdiction of the court is limited to a review of questions of law."

Sec. 1325. "* * * An appeal to the Court of Appeals from an order must be taken within sixty days after service upon the attorney for the appellant of a copy of the order appealed from and a written notice of the entry thereof."

The order with notice of entry was never served upon the plaintiff-in-error, so that his time to appeal had not expired when his motion for leave to go to the Court of Appeals was refused.

FIFTH POINT.

The plaintiff-in-error should be held and adjudged released and discharged from all arrears of alimony and allowance for maintenance accrued on January 13, 1899; the order of the Special Term of the Supreme Court of the State of New York, dated December 30, 1901, and the affirming order of the Appellate Division of said court of May 26, 1902, should be reversed and the cause remanded to said Supreme Court of the State of New York, with directions and instructions for granting to plaintiff-in-error the perpetual stay and injunction prayed for, and to take such other and further proceedings not inconsistent therewith as may be proper, with costs.

All of which is respectfully submitted.

HATCH, KEENER & CLUTE,
Attorneys for Plaintiff-in-Error.

WILLIAM A. KEENER,
Of Counsel.

Dated October 3, 1904.

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Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. ~~220~~. 56.

WILLIAM B. WETMORE,
Plaintiff-in-Error,

vs.

ANNETTE B. MARKOE (fomerly Annette B. W. Wetmore),
Defendant-in-Error.

Reply Brief of Plaintiff-in-Error.

HATCH, KEENER, & CLUTE,
Attorneys for Plaintiff-in-Error,
100 Broadway,
Borough of Manhattan,
New York City.

WILLIAM A. KEENER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

WILLIAM B. WETMORE,
Plaintiff-in-Error,

against

ANNETTE B. MARKOE (formerly Annette B. Wetmore),
Defendant-in-Error.

Reply Brief of Plaintiff-in-Error.

FIRST POINT.

The record shows jurisdiction in this court to entertain the cause.

A.

The application made to the Special Term of the Supreme Court of the State of New York was made as of right, and was not addressed to the favor of the court.

The application was authorized by Section 1268 of the Code of Civil Procedure of New York, which reads as follows:

"At any time after one year has elapsed,

since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order, directing the judgment to be cancelled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which such judgment was recovered, an order must be made directing said judgment to be cancelled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is cancelled and discharged by order of the court, giving the date of entry of the order of discharge. Where the judgment was a lien on real property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall not be affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy. Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment-creditor, or his attorney of record in said judgment, in the same manner as prescribed in Sections 796 and 797 of the Code of Civil Procedure, if the residence or place of business of such creditor, or his attorney is known, but if unknown and

cannot be ascertained after due diligence, or if such creditor is a non-resident of this State, and his attorney is dead, removed from, or cannot be found within the State, upon proof of said facts by affidavit a judge of the court may make an order that the notice of such application be published in a newspaper designated therein once a week for not more than three weeks, which publication shown by the affidavit of the publisher shall be sufficient service upon such judgment-creditor, of the application."

This Section is mandatory.

Matter of Brandreth, 14 Hun, 585.

The Section is, however, simply declaratory of the pre-existing practice.

West Philadelphia Bank v. Gerry, 106 N. Y., 467.

In delivering the opinion in the case last cited, DANFORTH, J., referring to Section 1268, said at page 472:

"But the respondent says the provisions of the Code were not enacted until after the decision in those cases. That is true, yet the relief formulated by it had long before been effected by the uniform practice of the courts (Baker v. Judges of Ulster, 4 Johns., 191: Baker v. Taylor, 1 Cow., 165; Alcott v. Avery, 1 Barb., Ch. 347). The Code introduced no new law, but was in conformity with that prac-

tice and affirmatory of it. Its language is not open to doubt; but if it were, the act is remedial and should receive such construction as would advance its object."

B.

The application being of right, the court could not refuse to entertain it because of the alleged contempt of the plaintiff-in-error.

Hovey v. Elliott, 167 U. S., 409.

C.

Had the application been addressed to the favor of the court the plaintiff-in-error should not have been refused a hearing until he was adjudged in contempt.

Palmer v. Palmer, 36 Fla., 385.

In delivering the opinion of the court, in Palmer v. Palmer, TAYLOR, J., said, at page 392:

> "At the June Term, 1891, of this court, the complainant, appellee in this case, moved here to dismiss this bill upon the ground that the defendant (appellant) had been adjudged to be in contempt of the court below for violating its order of injunction in reference to the removal of the children, which contempt, it is claimed, continued, and had not been purged.

In refusing this motion to dismiss, we hold, in effect, that the record here did not show that there had ever been an adjudication in the contempt proceedings against the defendant, and that, in the absence of any proper service of the rule to show cause why she should not be held for contempt, there could not be any proper adjudication against her in that proceeding; for the simple reason that it would be a condemnation without giving her an opportunity to be heard on the charge of contempt preferred against her."

Strong v. Strong, 1 Abb. Pr. N. S., 358.

At page 365, the court said:

"I think, moreover, that it is very doubtful whether the bare fact that a party is charged in *ex parte* affidavits (although there is no denial of them), with having wilfully disobeyed an order of the court will be sufficient to induce the court to withhold a favor from such a party. I am inclined to the opinion that to induce a court to withhold a favor on the ground that the applicant is in contempt, such party must have been adjudged by the court to be in contempt."

It is nowhere disclosed in the record that plaintiff-in-error had been adjudged in contempt, and it is admitted on the brief of the learned counsel for the defendant-in-error that he had not been so adjudged (see page 17 of his brief). It is there urged, however, that "the absence of such an orded (adjudging him in contempt), is explained by the facts disclosed in the record, that the plaintiff-in-error, after

the judgment of divorce was made, left the State of New York, and keeps himself without the jurisdiction of the courts of that State."

As under the New York Code of Civil Procedure service need not have been made upon the plaintiff-in-error personally, but could have been made upon his attorneys had the defendant-in-error desired to have him adjudged in contempt, the absence of the plaintiff-in-error from the State, it is submitted, does not excuse the failure of the defendant-in-error to make the motion.

Code of Civil Procedure, Sections 1773; 14, subdiv. 3; 2266-2269:

Sec. 1773: "Where the husband makes default in paying any sum of money specified in the last Section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last Section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in Title third of Chapter seventeenth of this act. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual."

Section 14: "A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded or prejudiced, in either of the following cases:

* * * * * * *

"3. A party to an action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court."

Section 2266: "In a case specified in Section 14 of this act, or in any other case where it is specifically prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish, by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded or prejudiced thereby, the offence must be punished as prescribed in this title."

Section 2267: "When the offence is committed in the immediate view and presence of the court, or of the judge or referee, upon a

trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge or referee, stating the facts which constitute the offence, and bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor."

Section 2268: "Where the offence consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law."

Section 2269: "The court, or judge, authorized to punish for the offence, may, in its or his discretion, where the case is one of those specified in either of the last two sections, and, in every other case, must upon being satisfied, by affidavit, of the commission of the offense, either

"1. Make an order, requiring the accused to show cause before it or him, at a time and place therein specified, why the accused should not be punished for the alleged offence; or

"2. Issue a warrant of attachment, directed to the sheriff of a particular county, or generally, to the sheriff of any county where the

accused may be found, commanding him to arrest the accused, and bring him before the court or judge either forthwith, or at a time and place therein specified, to answer for the alleged offence."

Pitt v. Davison, 37 N. Y., 235.
Isaacs v. Calder, 42 App. Div., 152.

D.

The Special Term Justice, in whom the discretion vested, if it existed at all, to refuse to entertain this application, regardless of its merits, having in fact denied the application because, in his opinion, the Bankrupt Act did not discharge such a claim, it should be assumed that a court affirming such a decision without opinion, affirmed it for the reason given by the Special Term Justice.

If such an assumption is not to be made in this case, then decisions without opinions are of very little use as precedents, since it cannot be said that any such decision stands for any further proposition than that a given party should or should not succeed.

The case of Rogers v. Decker, cited by the learned counsel for defendant-in-error on page 8 of his brief, stands only for the elementary principle that an affirmance without an opinion does not make the affirming court responsible for all of the reasons

that may have been assigned by the court below.

That the Special Term justice denied the application on a ground involving a federal statute is conceded. The memorandum filed by him on denying the motion is found at folio 262 of the record in this case, and reads as follows:

> "Motion denied with $10 costs, upon the authority of *Re* Anderson, 97 Fed. Rep., 321; Maisner v. Maisner, 62 App. Div., 286; Audobon v. Schufeldt, 181 U. S., 575."

E.

The application of the plaintiff-in-error to the Special Term, being duly authorized by law, the fact that he might have pursued some other method does not deprive this court of jurisdiction to review this case.

On page 11 of his brief the learned counsel urges as a reason why this court has not jurisdiction, that the plaintiff-in-error might have pursued some other remedy by which the case could have been passed upon by the Court of Appeals without a certificate from the Appellate Division permitting an appeal to that court. It is certainly a novel proposition that one who has pursued a perfectly proper remedy and has had his application denied by the highest court of record in the state having jurisdiction to pass upon the application is to be denied relief by this court for the reason that, had some other remedy been pursued, the Court of Appeals would have had jurisdiction as a matter

of right. It can hardly be seriously urged that this plaintiff-in-error, who committed no error in the remedy pursued by him, is as a consequence precluded from availing himself of the benefit of the Bankrupt Law. Yet, if the defendant-in-error is right in his contention, such would seem to be the result, as the question is now, so far as the state courts are concerned, *res adjudicata.*

SECOND POINT.

It is not for this court to determine whether or not the plaintiff-in-error is in contempt of the Supreme Court of the State of New York.

The learned counsel cites no case in support of the second point on his brief, that this court should not entertain jurisdiction because of the alleged contempt of the Supreme Court of the State of New York. That he does not do so is probably accounted for by the existence of the fundamental principle that one court does not concern itself with the contempts of another court.

Strong v. Strong, 1 Abb. Pr. N. S., 358.

Furthermore, it must be remembered that this plaintiff-in-error has never been adjudged in contempt. It must also be remembered that unless the application was addressed to the favor of the court, the question of contempt is of no moment.

THIRD POINT.

It is not the contention of the plaintiff-in-error that a decree for the payment of alimony necessarily creates a debt.

Alimony awarded in New York since 1895 is not a debt within the meaning of the Bankrupt Law, for the reason that since that date the decree has been subject to alteration or modification by the court, even though no provision is made therefor in the judgment awarding the alimony.

> New York Laws, 1895, Chapter 891.
> New York Code of Civil Procedure, Sec. 1759.

Nor is alimony awarded prior to 1895 under a judgment which by its terms was subject to modification or alteration by the court a debt within the meaning of the Bankrupt Law.

The learned counsel for the defendant-in-error points out as an objection to our position that there is some alimony which cannot be regarded as a debt. If that fact was not fully appreciated and conceded by the plaintiff-in-error, he could not, in view of the decision of this court in Audobon v. Schufeldt, 181 U. S., 575, appear here in good faith.

The learned counsel for the defendant-in-error suggests at page 29 of his brief that "even though the court may have power to modify a decree, still, until such discretion is exercised, the amount due is equally as much a fixed liability as is the amount

due under a decree for which the court has not such jurisdiction."

It would seem to be a sufficient reply to this suggestion to say that a liability which is subject to the control of the court, either as to its amount or existence, or both, cannot be said to be "absolutely owing at the time of the filing of the petition." Such was the opinion of Mr. Justice Gray as expressed by him in Audobon v. Schufeldt, at page 577; of the report of that case, which will be found quoted in the main brief of plaintiff-in-error, at page 20.

FOURTH POINT.

The plaintiff-in-error does not contend that a judgment for alimony represents a debt reduced to a judgment. His contention is that as the law of New York stood when alimony was awarded the defendant-in-error the judgment awarding it was a fixed liability evidenced by a judgment.

In the consideration of this case, the character of the duty of the husband to support his wife is immaterial. It is equally immaterial whether or not alimony when awarded constitutes a debt according to the common law conception of a debt. Neither are we concerned with the question of whether a man is under a moral duty to support another

man's wife, as this plaintiff-in-error is required to do.

The simple question is whether a judgment for a fixed amount, absolutely and unalterably owing —so unalterably owing that it is beyond the power of the legislature or the court to change it in any particular—is within the meaning of Section 63 of the Bankrupt Act, "a fixed liability as evidenced by a judgment * * * absolutely owing."

FIFTH POINT.

It is not within the power of a Court of New York to preclude a plaintiff indirectly from recovering the amount of alimony granted prior to 1895.

The learned counsel for the defendant-in-error, at page 29 of his brief, says:

> "A decree providing for alimony is not in its nature an ordinary judgment for a fixed liability. While the court could not, perhaps, change the amount, it could indirectly preclude the plaintiff from recovering the amount."

He then proceeds to cite sections of the Code showing that a plaintiff to whom alimony has been awarded has rights not conferred upon the ordinary judgment creditor. But he neither cites, nor can he refer the court to any statute, section of the code, nor reported decision holding in accord with his statement that the court can "indirectly pre-

clude the plaintiff from recovering the amount." That the plaintiff to whom alimony is awarded has remedies additional to those conferred upon the ordinary judgment creditor certainly does not establish the proposition. The fact that a defendant in arrears for alimony is subject to arrest, notwithstanding imprisonment for debt is abolished, does not establish the proposition. The fact that the court can require the defendant to give security for carrying out the decree of the court does not establish the proposition. The fact that the court, if he fails to give security or make payments as directed by the court, may cause his personal property, and the rents and profits of his real estate to be sequestered, and may appoint a receiver, thereof, does not establish the proposition. Neither does the fact that such a defendant, who has been imprisoned for non-compliance with the order of the court may be released from imprisonment, establish such a proposition. Nor can such proposition be established. (See page 9 of the main brief of plaintiff-in-error.)

The citations by the learned counsel may show that a judgment for alimony is not regarded as an "ordinary judgment." But do they show that the obligation in this case is not "a fixed liability, evidenced by a judgment, * * * absolutely owing", within the meaning of Section 63 of the Bankrupt Act? There is nothing said about an extraordinary judgment in the Bankrupt Act, and a judgment, the holder of which is given unusual remedies, is still a judgment.

SIXTH POINT.

The alimony awarded to the defendant-in-error was not given as compensation for a "wilful and malicious injury to her person or property."

It is respectfully submitted that the question to be considered in this connection is not whether the plaintiff's rights were violated, either as to her person or property, but whether the alimony awarded to her is to be regarded as compensation for ~~a contempt~~ an injury committed.

To conceive of a divorce suit as in its essence an action of tort is a proposition which required a vivid imagination, such as the learned author of Bishop on Marriage and Divorce, had.

In the case cited by the learned author, Mangles v. Mangles, 6 Mo. App., 481, 484, the following language is found :

> "Nor is the action for divorce an action of tort."

That a wife cannot maintain an action against her husband for such a tort as the defendant-in-error contends was committed in this case, is conceded by the learned counsel for the defendant-in-error (see page 33 of his brief).

Is alimony, then, as awarded by the courts of New York, to be regarded as a sum of money given to a wife in lieu of damages for an injury done her ~~in~~ a

wilful injury to her person or her property? In the absence of statute, there was no jurisdiction in the courts of New York to grant a divorce as distinguished from annulling a marriage for causes existing prior to the marriage.

> Erkenbrach v. Erkenbrach, 96 N. Y., 456, 463.

The authority of the court to make an award of alimony is purely statutory.

> Erkenbrach v. Erkenbrach, 96 N. Y., 462.

That authority is found in Subdivision 2 of Section 1759 of the Code of Civil Procedure, which, so far as pertinent to this case, reads as follows:

> "The court may, in the final judgment dissolving the marriage, require the defendant *to provide suitably for the education and maintenance of the children of the marriage and for the support of plaintiff* as justice requires, having regard to the circumstances of the respective parties."

It will be noticed that by this section the husband may be required *to provide suitably for the education and maintenance of the children of the marriage and for the support of plaintiff* as justice requires, having regard to the circumstances of the respective parties.

There is no suggestion here of a penalty. There is no suggestion of awarding damages. Nor is any such suggestion found in the cases decided under this law.

In the Matter of the estate of Ensign, 103 N. Y., 284, FINCH, J., says, at page 289:

> "When the court dissolves the marriage contract at the suit of the innocent wife, it is

authorized to decree the payment to her of a suitable allowance. And why is that? If any martial right continues after the divorce, the wife remains entitled to her support and may nforce it in the ordinary way. On the contrary, the statute recognizes that when the marriage tie is broken, and the relation ended, no future rights will remain in the wife and no future obligations bind the husband which have their root in the marriage relation. *The court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife which the divorce cuts off and forbids in the future.* The tribunal granting the decree investigates the husband's financial condition, takes proof of the value of his property, and then makes a suitable allowance for her life, and so puts the decree and its power in the place and room of what is lost in the future."

Dated November 7, 1904.

Respectfully Submitted,
HATCH, KEENER & CLUTE,
Attorneys for Plaintiff in Error,
100 Broadway,
New York City.

WILLIAM A. KEENER,
Of Counsel.

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FILED
NOV 21 [illegible]
JAMES H. MCKENNEY

IN THE

Supreme Court of the United States

[redacted]

WILLIAM B. WETMORE,

Plaintiff-in-Error,

vs.

ANNETTE B. MARKOE (formerly Annette B. W. Wetmore),

Defendant-in-Error.

SUPPLEMENTAL REPLY BRIEF

OF PLAINTIFF-IN-ERROR.

Submitted by Permission of the Court.

HATCH, KREHER & CLOTH,
Attorneys for Plaintiff-in-Error,
100 Broadway,
Borough of Manhattan,
New York City.

WILLIAM A. KREHER,
Of Counsel.

APPEAL PRINTING CO., 14 VESEY ST. TEL., 4311 CORTLANDT.

United States Supreme Court.

WILLIAM B. WETMORE,
Plaintiff-in-Error,

against

ANNETTE B. MARKOE (formerly Annette B. Wetmore,
Defendant-in-Error.

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-IN-ERROR, SUBMITTED BY PERMISSION OF THE COURT.

FIRST POINT.

The application of Section 1268 of the Code of Civil Procedure is not confined to judgments which have been docketed, and if it were, there was a judgment docketed in this case.

The section, which will be found quoted at length on the reply brief of plaintiff-in-error (pp. 1-3),

provides that "an order must be made directing said judgment to be cancelled and discharged of record, and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is cancelled and discharged by order of the court, giving the date of entry of the order of discharge."

A judgment may be of record though not docketed, and therefore one might well be entitled to an order directing a judgment to be discharged of record, though he could not have the same marked on the docket as cancelled or discharged. The Code of Civil Procedure, Section 1236, provides that

> "Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, and such filing shall constitute the entry of the judgment. The clerk shall, in addition to the docket books required to be kept by law, keep a book, styled the judgment book, in which he shall record all judgments entered in his office."

Judgments filed are usually also docketed, and the Legislature in the enactment of Section 1268 intended to supplement the order of the court by the action of the clerk, but the fact that the directions given to the clerk by the section will not in a given case, namely, where the judgment has not been docketed, adequately provide for cancellation, is no reason for saying that the authority is not vested in the court.

It is urged by the learned counsel for the defendant-in-error that the application here was not to have the judgment cancelled of record, but for an injunction. The answer to this suggestion is that in the notice of motion (see Record, p. 3, fol. 9) the court is asked to grant "such other and further relief as to the court may seem proper." If

the contention of the plaintiff-in-error is sound that he was relieved from his liability for the arrears of alimony by the discharge in bankruptcy, the court, it is submitted, had authority under this section to cancel and discharge the judgment of record *pro tanto*. Furthermore, it should be remembered that a judgment was actually docketed in this case, and under that judgment certain trust funds of the plaintiff-in-error were sequestrated (see Record, pp. 21-22, fols. 63-64).

It is true that it is stated by the learned counsel for the defendant-in-error, at page 2 of his supplemental brief, that this judgment has long since been satisfied, and in corroboration of his statement he refers to page 109-J of the record. But the record at page 109-J discloses nothing more than a statement to that effect contained in a brief of the learned counsel for the defendant-in-error, used by him in the Court of Appeals and submitted by him in opposition to the application of the plaintiff-in-error for leave to appeal to the Court of Appeals. Nowhere in the record does it appear that this judgment has ever been satisfied, and it is submitted that a statement by counsel by way of argument in a brief cannot be taken as a substitute for evidence. It appears from the record that this trust fund had been sequestrated and was still so held when the plaintiff-in-error applied for and was denied relief because of his discharge in bankruptcy.

Section 1268 of the Code has been declared by the Court of Appeals to be declaratory of the pre-existing practice; to be remedial in its nature; and to be a provision which should be liberally construed (see p. 3 of Reply Brief of plaintiff-in-error). It is to be noted that the cases referred to by the court in the opinion there quoted are cases where an injunction was applied for.

SECOND POINT.

The court had authority to grant relief on motion.

It is urged in the supplemental brief of the learned counsel for the defendant-in-error that no such authority exists in New York. This was the practice followed in

Moore v. Upton, 50 N. Y., 593,

and referred to at page 23 of the original brief of plaintiff-in-error. It was the practice referred to in the cases cited by the court in

West Philadelphia Bank v. Gerry, 106 N. Y., 467.

The learned counsel for the defendant-in-error relied on two cases as showing the want of power of the court to grant the relief prayed for by the plaintiff-in-error on motion. *Spears v. Matthews*, 66 *N. Y.*, 127, one of the cases cited by him, was a case in which the court held that it had no power on application of the plaintiff, to renew or continue a temporary or preliminary injunction pending an appeal after judgment had gone against him in the action. As the judgment determined that the plaintiff had no rights, it would be remarkable if the court had construed the provisions of the Code providing for temporary injunctions to extend to such a case.

The other case cited by him, *Jackson v. Bunnell*, 113 *N. Y.*, 216 involves the proposition that a plaintiff who has obtained a judgment cannot by a motion in the action in which he obtained the judg-

ment get supplemental relief. He either was or was not entitled to the injunction under the judgment obtained by him and the judgment is complete in itself. But it is a very different proposition to hold that a court is without power, when it finds that its judgment should no longer be enforced against a defendant, to prevent its enforcement on motion.

It is respectfully submitted that the Supreme Court of New York has authority without regard to the Code provisions, to issue a restraining order. As recognizing such authority, see in addition to the cases heretofore cited showing that the practice followed by the plaintiff-in-error is the practice in New York,

Woerishoffer v. North River Construction Co., 99 N. Y., 398.

THIRD POINT.

The position of the plaintiff-in-error would have been no better had he begun an independent action as suggested by the learned counsel for the defendant-in-error, than was his position on a motion made in the divorce proceeding.

The learned counsel for the defendant-in-error seems to contend that the plaintiff-in-error had no rights in court, for the reason that he proceeded by motion, and that having no rights in court on the motion, the court could, its favor being sought, refuse to hear him, notwithstanding he had never

been adjudged in contempt. Had the plaintiff proceeded by an original action to obtain the relief which he sought by motion, he would still have been in a Court of Equity. Being in a Court of Equity, if the relief sought by motion was addressed to favor, it is difficult to see how the filing of a complaint would have entitled him as of right. If the court could not have dismissed his complaint because of his seeming contempt without giving him a hearing had he filed a complaint, it is exceedingly difficult to see why, when he followed a practice permitted by the court and made a motion, he should be in any worse position before the court than if he had followed the practice suggested by the counsel for the defendant-in-error.

FOURTH POINT.

The denial of the motion involved the decision of a federal question, over which this court has jurisdiction.

A.

It is respectfully submitted that without regard to the sequestration proceedings, which will be referred to hereafter, the denial of the motion made by plaintiff necessarily involved a federal question.

The only question considered by the court, and the only question which it had a right to consider, as plaintiff-in-error contends (see Reply Brief of Plaintiff-in-error, pages 1-4) was the effect of the Bankrupt Law. If but for the fact that the court did not regard the liability as discharged by the discharge in bankruptcy, the motion would have

been granted, then the plaintiff-in-error was denied relief in consequence of the construction placed by the court upon a federal statute.

Would it be contended that if the plaintiff-in-error had sought by an independent proceeding the cancellation of this judgment or the stay of execution on the ground of his discharge in bankruptcy, that the defendant-in-error could not have removed the case into the Federal courts? If she could have, and on the motion made by the plaintiff-in-error in this case, no other question was presented than a Federal question, the decision of which led to the denial of the motion, it would seem that this court ought to have jurisdiction on writ of error.

It is respectfully submitted that this case should be governed by the rule laid down by Mr. Justice STRONG in

> Tennessee v. Davis, 100 U. S., 257, at 264:
>
> "The case consists of the rights of one party as well as the other, and may truly be said to arise under the constitution, or a law, or a treaty of the United States, whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted."

B.

The suggestion to which the above argument is urged as an answer, involved the idea that it was time enough for the plaintiff-in-error to urge his discharge in bankruptcy when, in consequence of

the action of the defendant-in-error, he was prejudiced. It is respectfully submitted that even from this point of view, the plaintiff-in-error is clearly entitled to have his case considered by this court. The record shows the following undisputed facts:

(1) A continuous fixed liability, not subject to modification or change, evidenced by the judgment of divorce.

(2) A docketed judgment for the specific sum of $4,500, based upon the judgment of divorce.

Record, page 82.

(3) *Proceedings of sequestration by the judgment creditor, resulting in a judgment directing "that the net income of a certain trust fund of $100,000* should be paid to deponent (plaintiff) from time to time *whenever and so long as the said William B. Wetmore should be in default in paying the said alimony and the said moneys awarded for the maintenance and education of the said three infant children."*

Record, pages 21-22, folios 63-65.

(4) *The only moneys ever received by plaintiff were payments by the New York Life Insurance and Trust Co. and Continental Trust Co.* under said judgment of sequestration.

Affidavit of Mrs. Markoe, pp. 21-22, folios 63-64.

To the same effect see affidavit of Mr. Candler, p. 30, folio 89.

(5) The moneys so received under said judgment from said trust companies were not sufficient to pay the said alimony and for maintenance and education of the children:

Affidavit of Mrs. Markoe, p. 22, folio 65.

(6) After crediting all moneys received from said two trust companies, there remains due for alimony and for maintenance and education of the children a large sum of money, exceeding the sum of $30,000.

Affidavit of Mrs. Markoe, p. 22, folio 66.

(7) The plaintiff-in-error states the amount due for alimony and for maintenance and education of the children to be the definite sum of $19,221.60 on the 13th of January, 1899, the date of adjudication in bankruptcy.

Page 5, folio 14; page 8, folio 23.

(8) Mr. Candler gives further particulars of the sequestration judgment, directing payment of income, in substance as follows: Owing to failure of defendant to comply with the provisions of the judgment of divorce, the plaintiff instituted a certain action against defendant and his mother as trustee of his father's will, which resulted in a judgment "*directing that the income from a certain trust fund referred to in the will of the said defendant's (William B. Wetmore's) father for his benefit, should be paid to the said plaintiff, whenever he, the said defendant, should be in default in mak-*

ing payments under the said judgment of divorce."

Page 30, folio 88.

As has been before stated (see Point I of this brief), it nowhere appears that the judgment docketed has ever been satisfied. The record leaves that matter entirely to speculation. It does appear affirmatively that this trust fund is held to secure to the defendant-in-error the arrears of alimony and allowance even in excess of the docketed judgment. It is conceded by the record that he is largely in arrears, and was at the time when he filed his petition in bankruptcy, and when he was adjudicated a bankrupt, and therefore it must be presumed that this trust fund secured in the sequestration proceedings was being applied at the time when plaintiff made this application for the discharge of those arrears.

C.

It has been urged by the learned counsel for the defendant-in-error that this court has refused to review an order denying a motion to quash an execution, and that therefore it cannot entertain jurisdiction to review an order denying an application such as was made by the plaintiff-in-error in this case. It is respectfully submitted that the conclusion does not follow from the pressure. It is true that this court has refused to review an order denying an application to quash an execution, but it has done so for apparently one of two reasons, or both: (1) That the application was refused by the court in the exercise of its discretion; (2) that the quashing of the execution could not be regarded as final, for the reason that another execu-

tion might issue. In the case at bar, had the application made by the plaintiff-in-error been granted, it would have been a final determination that the defendant-in-error was not entitled to collect of the plaintiff-in-error the arrears of alimony and allowance.

FIFTH POINT.

The judgment awarding alimony was a fixed liability.

It is only proposed to consider in this connection the question as to whether a sum of money decreed by a court to be paid annually or at stated times during the year can be said to be a judgment for a fixed amount within the meaning of the Bankrupt Law.

The suggestion has been made that it cannot be said to be a fixed liability, because the amount payable at any given time must be fixed by computation. Would it be seriously contended that the maker of a note, payable in installments, could not be discharged in bankruptcy as to installments past due because to ascertain the amount due one would have to enter into a computation? Would it be contended that a tenant under a written lease whereby the rent is payable monthly would not be discharged in bankruptcy as to the arrears of rent due because it would be necessary to make a computation in order to determine the amount due at the time of filing his petition? If the contention could not be made successfully in either of the cases supposed, it is difficult to see how the contention can be made as to the liability arising under a judgment. Section 63, so far as material to this question, reads as follows:

"Debts of the bankrupt may be proved and allowed against his estate which are

"1. *A fixed liability as evidenced by a judgment or an instrument in writing.*"

A fixed liability, under this provision of the Bankrupt Law, can be evidenced in one of two ways—either by a judgment, or an instrument in writing. And if a debt under an installment contract can be discharged in bankruptcy, it is submitted that a debt accruing by installments under a judgment is equally entitled to discharge. And there seems to be no good reason why both should not be held to be within the provision of the Bankrupt Law. That is certain in legal contemplation which can be rendered certain.

The suggestions presented by the learned counsel for the defendant-in-error in the fourth point of his supplemental brief show conclusively that the plaintiff-in-error would not be entitled to claim that the discharge in bankruptcy released him from liability as to alimony and allowance accruing after the filing of his petition. But the plaintiff-in-error conceded this, and therefore made his application entirely with reference to past obligations. The discussion of provability of the claim of the plaintiff-in-error in the bankruptcy proceedings and its discharge will be found in the original brief of the

plaintiff-in-error at page 7, and in the reply brief of plaintiff-in-error at pages 12-18.

Dated November 19, 1904.

Respectfully submitted,

HATCH, KEENER & CLUTE,
Attorneys for Plaintiff-in-Error,
100 Broadway,
New York City.

WILLIAM A. KEENER,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1904.

WILLIAM B. WETMORE, Plaintiff in Error, AGAINST ANNETTE B. MARKOE (formerly ANNETTE B. W. WETMORE), Defendant in Error.	No. 56.

ARGUMENT AND BRIEF ON BEHALF OF DEFENDANT IN ERROR.

This case comes before this Court on writ of error (p. 118), to review an order of the Appellate Division, First Department, of the Supreme Court of the State of New York, of May 26th, 1902 (p. 92), which affirmed an order of the Supreme Court of the State of New York, made at Special Term December 30th, 1901 (p. 89), which last mentioned order denied the application of the plaintiff in error "for an order enjoining and restraining the above named plaintiff (here the defendant in error) and her attorneys from issuing execution upon the judgment of this Court dated the 1st day of April, 1892, or if execution has been issued, from enforcing the same in any way for the collection of arrears of

alimony and allowance for the support and education of the three children of the said plaintiff and defendant under said decree of divorce which accrued and became due on or before January 13th, 1899, amounting to the sum of $19,221.60, and from collecting or attempting to collect the judgment in this action so far as relates to such arrears, or from instituting any proceeding in this action or in any action or actions founded upon claims for arrears of alimony and allowance for the support of said children and from perpetually enjoining and staying all proceedings in this action or any other action founded upon such arrears or upon any cause of action arising therefrom upon the part of the plaintiff herein or her attorneys or agents, or on the part of any person or corporation acting or pretending to act on the part of said plaintiff or her attorneys or agents, and for such other and further relief as to the Court may seem proper."

From the order now sought to be reviewed an appeal was taken to the Court of Appeals, the Court of last resort and of highest appellate jurisdiction in the State of New York, and after the appeal had been submitted by the appellant and argued by the counsel for the respondent that appeal was dismissed (p. 96).

Assignment of Errors.

The assignment of errors printed at pages 115 and 116 is that the Supreme Court of the State of New York at Special Term and in the Appellate Division erred in not granting the injunctive relief asked for by the plaintiff in error and also erred in deciding that the arrears of alimony and allowance which had accrued and become due to the plaintiff from the defendant on or prior to the 13th day of January, 1899, under the judgment entered herein on April 1st, 1892, were not a provable debt within the intent and meaning of the Bankruptcy Act of July 21st, 1898, and that

the discharge of the defendant under the Bankruptcy Act did not release the amount owing by him for such arrears of alimony and allowance.

Statement.

It does not appear affirmatively from the Record that the Appellate Division of the Supreme Court of the State of New York rested its order of affirmance on the Federal question.

On April 1st, 1892, in the Supreme Court of the State of New York for the City and County of New York the plaintiff obtained a judgment of absolute divorce against the defendant William B. Wetmore because of his adultery, which judgment granted to the plaintiff liberty to resume her maiden name and adjudged and declared that it should be lawful for her to marry again in the same manner as if the defendant William B. Wetmore were actually dead, but that it should not be lawful for him to marry again until the plaintiff is actually dead; and which judgment also required him to pay to her $3,000 annually, in quarterly payments, as alimony and also $3,000 annually, in quarterly payments, for the maintenance and education during minority of the three children, issue of the marriage, whose custody was awarded to the plaintiff; and the defendant was also required by the judgment to give two bonds each for $25,000, one to secure the payment of the alimony, and one to secure the payment of the sums awarded for the maintenance and education of his three infant children (pp. 15 to 20).

The defendant, William B. Wetmore, after the judgment of divorce had been entered, left the State of New York, and he has remained absent therefrom ever since, and in violation of the judgment he married again (p. 4, p. 109 *e*, and p. 29). He has never given either of the two bonds required by the judgment, nor has he ever voluntarily paid one dollar for alimony or for the maintenance or education of either of his three infant children (p.

29, and p. 109 e), and he has kept himself continuously without the jurisdiction of the Courts of the State of New York (p. 21, and p. 109 e).

The unpaid accrued alimony including the sum awarded for the maintenance and education of the three infant children amounted at the time of the defendant's application to upwards of $30,000 (p. 22). The defendant in his affidavit on which he moved for the relief which was denied him by the order which was affirmed by an order of the Appellate Division of the First Department of the Supreme Court of the State of New York which latter order is the one now sought to be reviewed, he stated that he is now able to pay the amounts due under the judgment of divorce, and also stated in the same affidavit that he is desirous and is ready "to comply with the said judgment of divorce as soon as it shall be declared that my said discharge in bankruptcy has relieved me from the aforesaid arrears" (p. 9).

In April, 1901, the defendant made a motion in this action which included the same relief asked for on the motion which resulted in the order which was affirmed by the order now sought to be reviewed After argument before the Special Term of the Supreme Court of the State of New York that motion was denied by the order dated at Special Term the 30th day of April, 1901 (a copy of that order is printed at pp. 33 to 37). On denying that motion the learned Judge reviewed the facts at some length as fully appears in his opinion which is reported in

Wetmore *vs.* Wetmore, 34 Misc. Rep. (N. Y.), 640.

It also appears that in the bankruptcy proceedings no claim for alimony or for the maintenance or education of the three infant children was proved (p. 25).

The plaintiff, however, did prove a claim for the value of certain personal property belonging to her

which had been unlawfully converted by the defendant to his own use (pp. 25 to 27).

In the Court below the defendant in error, there the plaintiff, contended that her claim for alimony and for the maintenance and education of her three infant children was not a debt provable in bankruptcy, and that the discharge in bankruptcy would not relieve the plaintiff in error from liability to pay the same (p. 21). The only moneys which she ever received on account of the alimony and for the maintenance and education of the three infant children, under the judgment of divorce, were certain payments which had been made to her from time to time by the New York Life Insurance and Trust Company and by the Continental Trust Company of the City of New York, pursuant to a judgment in equity made in an action in the Supreme Court of the State of New York, wherein the defendant in error was plaintiff and Sarah Taylor Wetmore, as trustee, under the will of Samuel Wetmore, deceased, and the plaintiff in error, were defendants (pp. 21 and 22), which judgment required that the net income of the trust fund of $100,000 should be paid to the defendant in error from time to time, whenever and so long as the plaintiff in error should be in default in paying the alimony and the moneys awarded for the maintenance and education of the three infant children, directed to be paid in and by the judgment of divorce and which equity judgment was subsequently modified so as to limit the annual payments to be made from the income of the trust estate to the sum of $3,000 per annum, to be used toward the maintenance and education of the three infant children. The moneys so received were not sufficient to pay the alimony and the amounts awarded for the maintenance and education of the children under the judgment of divorce, and, after crediting all moneys received from the two trust companies, there remained due to the defendant in error, under the judgment of divorce, for alimony and for the amounts awarded for the

maintenance and education of the infant children, upwards of $30,000 (p. 22).

For a long time before the plaintiff in error filed his petition in bankruptcy, and at the time of the filing thereof, his mother Sarah Taylor Wetmore, was in very feeble and precarious health, and during all that time was a lady of large wealth, and the plaintiff in error was her only child, and, after he had filed his petition in bankruptcy, and pending his discharge and subsequent to his adjudication in bankruptcy his mother died on March 21st, 1899, leaving a will by which she gave all her residuary estate to the plaintiff in error and by which she appointed him the executor thereof, and under the will he became possessed of a large property and estate (p. 23).

In an affidavit made by the plaintiff in error a quotation from which appears at page 31 he deposed as follows:

"Since the said adjudication in bankruptcy I have become, through the death of my mother and under the provisions of her will, of sufficient means to discharge the arrears of alimony, which are claimed to be due and owing to the plaintiff, and I am ready and hereby offer and stand ready to pay the amount which has accrued and is payable whether before or subsequent to my adjudication in bankruptcy, providing only that the question as to what may be due and owing shall be finally determined by a proper tribunal, which I am advised is the United States Supreme Court, and that the question can and will be brought before that Court for final determination, and until such final determination it cannot authoritatively be declared whether under the present Bankruptcy Act a discharge in bankruptcy does or does not discharge arrears of alimony."

First Point.

The writ of error should be dismissed because the record fails to show jurisdiction in this Court to entertain the case.

(*a.*) While the record shows at page 88 that Mr. Justice Scott at Special Term denied the application on the Federal question that the discharge in bankruptcy did not relieve the bankrupt from the payment of past due alimony and allowance for the support of his infant children, the record does not show that that was the ground on which the decision of the Appellate Division, First Department of the Supreme Court of the State of New York, affirmed the order appealed from to that Court.

That court affirmed without opinion (p. 93).

Neither does the record disclose the grounds upon which the Court of Appeals dismissed the appeal.

The record shows at pages 109*h* to 109*m* that in the Court of Appeals other questions than the Federal question were argued, notably at page 109*h*, where the point was made that the defendant, being in contempt, was entitled to no consideration and was not in a position by appeal to ask for the relief he sought on the appeal to that Court.

In Walker *v.* Walker, 82 N. Y., 260, the Court of Appeals held that the Court has power, when and while a defendant in an equity action is in contempt, having disobeyed its order, to refuse to hear him, and at page 264 Chief Justice Folger, in delivering the opinion of the Court, says:

"We are brought to the conclusion that there has long been exerted by the Court of Chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the Courts of Chancery of this country."

It is a rule of law in the State of New York that an affirmance without an opinion makes the Appel-

late Court only responsible for the point decided below and not for the reasons given or opinions expressed.

Rogers *vs.* Decker, 131 N. Y., 490.

The point decided below by the Special Term order (p. 89) was that the Court would not grant to the plaintiff in error the injunctive relief he sought, and that point was affirmed on appeal, and from the authority last above cited this Court cannot say that the affirmance was for the reasons given by the Court at Special Term.

This Court has held that where the Supreme Court of a State decides a Federal question in rendering a judgment and also decides against the plaintiff in error on an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

Hale *v.* Akers, 132 U. S., 554.

In Hale *v.* Akers, *supra*, the Court said, at page 564:

"Both of the courts below decided that, irrespective of the Federal question, the agreement of October 11th, 1860, was decisive of the case. The construction of that agreement involved no Federal question, and controlled the whole case.

In Murdock *v.* City of Memphis, 20 Wall., 590, 636, this Court announced, as one of the propositions which flowed from the provisions of the second section of the act of February 5th, 1867, 14 Stat., 386, embodied in Section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a Federal question was erroneously decided against the plaintiff in error, the Court must further inquire whether there was any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that Court, notwithstanding the error in deciding the issue raised by the Federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue.

This principle has been repeatedly applied. In Jenkins *v.* Loewenthal, 110 U. S., 222, where two defenses were made in the State court, either of which, if sustained, barred the action, and one involved a Federal question and the other did not, and the State court in its decree sustained them both, this Court said that, as the finding by the State court of the fact which sustained the defense which did not involve a Federal question was broad enough to maintain the decree, even though the Federal question was wrongly decided, it would affirm the decree, without considering the Federal question or expressing any opinion upon it, and that such practice was sustained by the case of Murdoch *v.* City of Memphis, *supra* (see also, McManus *v.* O'Sullivan, 91 U. S., 578; Brown *v.* Atwell, 92 U. S., 327; Citizens' Bank *v.* Board of Liquidation, 98 U. S., 140; Chouteau *v.* Gibson, 111 U. S., 200; Adams County *v.* Burlington & Missouri Railroad, 112 U. S., 123; Detroit City Railway *v.* Guthard, 114 U. S., 133; New Orleans Water Works Co. *v.* Louisana Sugar Refining Co., 125 U. S., 18; De Saussure *v.* Gaillard, 127 U. S., 216, 234."

(*b.*) As the record does not show affirmatively that the Appellate Division, First Department, of the Supreme Court of the State of New York, affirmed the order of the Court below on the Federal question, there being other questions, notably the question of the contempt of the plaintiff in error, on which the order could have been affirmed, this Court will not entertain jurisdiction of this case under the well-established doctrine enunciated in its decisions, to the effect that to give this Court jurisdiction of a writ of error to a State court it must appear affirmatively not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

De Saussure *v.* Gaillard, 127 U. S., 216, 234.

In De Saussure *v.* Gaillard, *supra*, at page 234, the Court said:

"And it has been repeatedly decided, under Section 709 of the Revised Statutes, that to give this Court jurisdiction of a writ of error to a State court it must appear affirmatively not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it (Brown *v.* Atwell, 92 U. S., 327; Citizens' Bank *v.* Board of Liquidation, 98 U. S., 140; Chouteau *v.* Gibson, 111 U. S., 200; Adams County *v.* Burlington & Missouri Railroad, 112 U. S., 123; Detroit City Railway *v.* Guthard, 114 U. S., 133; New Orleans Water Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S., 18)."

In New Orleans Water Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S., 18, *supra*, the Court, referring to the rule above mentioned, adds at page 29:

"And in many recent cases under Section 709 of the Revised Statutes, this Court, speaking by the Chief Justice, has reasserted the rule that to give it jurisdiction of a writ of error to a State court it must appear affirmatively not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that 'its decision was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it.'" (Citing, 92 U. S., 327, *supra;* 98 U. S., 140, *supra;* 111 U. S., 200, *supra;* 112 U. S., 123, *supra;* 114 U. S., 133, *supra*).

In San Francisco City and County *v.* Itsell, 133 U. S., 65 and 66, the Court said:

"This Court has no jurisdiction to review a judgment of the highest court of a State, unless a Federal question has been either in express terms or by necessary effect decided by that court against the plaintiff in error."

In Detroit City Railway Co. *v.* Guthard, 114 U. S., page 133, *supra*, the Court, at pages 135 and 136, said:

"And at the last term in Chouteau *v.* Gibson, 111 U. S., 200, it was said: 'From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record not only that a Federal question was raised and presented to the highest court of the State for decision, but that it was decided or that its decision was necessary to the judgment or decree rendered in the case.' Murdock *v.* Memphis, 20 Wall., 590–636."

In Chouteau *v.* Gibson, 111 U. S., 200, *supra*, the Court said:

"From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record not only that a Federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case. Murdock *v.* Memphis, 20 Wall., 590–636."

(*c.*) The order sought to be reviewed by this Court is not a final judgment or decree within the meaning of the United States Revised Statutes, Section 709, because the plaintiff in error has not exhausted his remedy in the courts of the State of New York in such manner as to entitle him to be heard by the Court of Appeals, the highest court of the State of New York in which a decision of a suit presenting the Federal question could be had, as he has not commenced or prosecuted any suit, where the question could be fully determined by that Court as to whether the plaintiff in error is entitled to the injunction, which he sought to obtain by motion, or by submitting himself to the jurisdiction of the State Court, where on contempt proceedings the question here sought to be raised could be carried to the Court of Appeals.

The jurisdiction of the Court of Appeals of the State of New York is governed by Sections 190 and 191 of the Code of Civil Procedure.

(1.) An appeal may be taken to that Court *as a matter of right from judgments or orders finally determining actions or special proceedings* and from orders granting new trials on exceptions.

All other appeals can only be taken when allowed by the Appellate Division of the Supreme Court of the State of New York.

The plaintiff in error has not seen fit to bring up the question he here seeks to review, in the State Courts in such manner as would entitle him to be heard in the Court of Appeals before coming to this Court.

The two sections of the Code of Civil Procedure of the State of New York are as follows:

SECTION 190: THE JURISDICTION OF THE COURT OF APPEALS IN CIVIL ACTIONS.

The Court of Appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, eighteen hundred and ninety-five, at a general term of the supreme court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the court of appeals. From and after the last day of December eighteen hundred and ninety-five, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the Appellate Division of the Supreme court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the appellate division of the supreme court in any department where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be

reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

SECTION 191: LIMITATATIONS, EXCEPTIONS AND CONDITIONS.

The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court or a surrogate's court, unless the appellate division of the supreme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of appeals.

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors or in an action to recover wages, salary or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking on appeal when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals or unless in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals.

3. The jurisdiction of the court is limited to a review of questions of law.

4. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals.

In Colwell *v.* Tinker, 169 N. Y., 531, the Court at page 538 distinctly recognizes the right of a person

adjudged bankrupt to prosecute an *action* to procure a determination of the effect of a discharge in bankruptcy upon a judgment.

From a final judgment in such an action an appeal could be taken to the Court of Appeals, which Court would then have jurisdiction to determine the question. As that Court, therefore, in a proper proceeding could determine whether or not a judgment awarding alimony was a judgment for a fixed liability within the meaning of the bankruptcy act, and whether alimony due at the time of an adjudication in bankruptcy was discharged, this Court cannot entertain this writ of error until the highest court of New York has passed upon the subject.

(2.) An appeal may also be taken to the Court of Appeals from an order denying an application to discharge a person on *habeas corpus*, and in one branch of this litigation the Supreme Court of the State of New York intimated that before the plaintiff in error could have relief in respect to the allowance of alimony, or before it would be necessary to consider the effect of his discharge in bankruptcy, he should come within the jurisdiction of the Court and then a case could be presented where the question could be finally determined by the courts of the State of New York in *habeas corpus* proceedings as to his rights.

In Wetmore *v.* Wetmore (action for divorce) and Wetmore *v.* Wetmore (sequestration action), 34 Misc. Rep., N. Y., 643, Scott, *J.*, in denying an application made by the plaintiff in error, after referring to the issues of the judgment in the action for divorce and in regard to the judgment sequestrating the income of the trust estate for the benefit of the wife and children, said:

"It is not necessary upon this motion to consider the question argued at length upon the briefs of counsel, whether or not the applicant is technically in contempt of Court at the present time. At least his persistent evasion of the decrees and orders of the Court, and his unremitting and thus far successful attempts to avoid the payment of alimony to

his wife, do not entitle him to ask any favors at the hands of the Court, and afford excellent reasons why the relief, if any, to be afforded him should be limited to that to which he appears to be clearly and legally entitled. So far as concerns giving a bond to secure the support of his children and the payment of future alimony to his former wife, no order is necessary. The decree in the divorce action which provides for just such bonds, is still in force, and provides ample justification and warrant for the bonds which he now asks to be permitted to give. When he shall have indicated his respect for the decree of this Court, at least to the extent of complying with so much of its provisions as require that such bonds be given, it will be time enough to consider whether the decree in the sequestration action should be vacated and the securities held thereunder released. That decree presents a sure and certain method by which the necessities of the children can be provided for without delay or further litigation. It was only by reason of the applicant's own default that such a decree was made, and it is at least doubtful whether he should now be permitted to escape the consequences of his default by substituting for this certain provision for his children's support, the less certain provision of a mere promise to pay, no matter how solvent the surety for that promise may appear to be. *Nor should the question as to the effect of the discharge in bankruptcy upon the liability for the payment of past alimony be determined by this Court before the necessity to do so arises. That question is primarily one for the Federal courts, and is one upon which, up to the present time, those courts have not been in accord. If the applicant sees fit to bring himself within our jurisdiction, and is proceeded against here for non-payment of the alimony in arrear, it may be that the question will be presented in such a way that its decision will be necessary. At present it is unnecessary.* The applicant, although expressly admitting his present ability to comply with all the provisions of the decree of divorce, shows no greater readiness to so comply than he has heretofore done. He has not given the bonds provided for in that decree, and does not offer to do so, but seeks to give other bonds in place thereof. His offer to deposit a sum equal to the past unpaid

alimony is no compliance with the terms of the decree directing its payment. He has not even paid or tendered to his former wife the alimony which has become due since his adjudication as a bankrupt, although he concedes that that amount at least is due, and is unaffected by his discharge in bankruptcy, and he does not offer to pay it, except as a condition that he be relieved from some of the consequences of his former default.

I see nothing to justify granting any part of the motion upon the ground that the applicant has shown himself entitled to relief as a matter of discretion, nor does he show himself to be entitled thereto as a matter of strict right. His present plight is the direct result of his own acts, and no injustice will be done if he is left where he has placed himself."

Second Point.

As the plaintiff in error is in contempt of the Supreme Court of the State of New York in this cause, it is submitted that this Court should not entertain jurisdiction in this case, independently of the question whether or not jurisdiction has been shown by the record.

It is the law of the State of New York that where a party is in contempt the Court will not grant an application in his favor which is not a matter of strict right. If he applies to the Court for a favor it will only be granted on condition that he purges his contempt by complying with the former order of the Court.

Johnson *v.* Pinney, 1 Paige, 646.

The plaintiff in error now submitting himself to the jurisdiction of this Court, this Court, which has no direct power to compel him to comply with

the provisions contained in the judgment of divorce, about which he does not now complain, should, before hearing him upon his writ of error, require him to submit to the jurisdiction of the courts of New York and purge himself from his contempt to them, at least, in regard to such matters. The making of such an order would not be denying the plaintiff in error any right, as on compliance with such mandate he could then be heard in this Court upon his writ of error.

It will doubtless be argued by the counsel for the plaintiff in error that no order or decree has been made formally adjudging the plaintiff in error to be in contempt, but the absence of such an order or decree is explained by the facts disclosed in the record that the plaintiff in error after the judgment of divorce was made left the State of New York and keeps himself without the jurisdiction of the Courts of that State. Nevertheless the reports in this case of the proceedings had in the Supreme Court of the State of New York and in the Court of Appeals abundantly show that the plaintiff in error is in contempt of Court; and it is quite possible because of such contempt the Appellate Division, First Department of the Supreme Court of the State of New York affirmed the Special Term order denying the relief for injunction which the plaintiff in error moved for in the Court below, and it is also possible that for the same reason his application for leave to appeal to the Court of Appeals was also denied.

It affirmatively appears from page 109c that at the time the defendant in error applied to the Appellate Division for leave to appeal to the Court of Appeals he was still in contempt.

The courts of the State of New York during the litigation in this cause and in the equity suit above referred to on various occasions have frequently referred to the fact that the plaintiff in error was flagrantly in contempt of the Supreme Court of the State of New York.

In Wetmore *v.* Wetmore, 162 N. Y., 512, Bartlett, *J.*, said:

> "We have here a defendant who is in flagrant contempt of the Supreme Court and under its well settled rule is entitled to no hearing or relief until he places himself in a proper attitude to ask it."

In Wetmore *vs.* Wetmore, 149 N. Y., 531, Haight, *J.*, said:

> "After the decree he removed with his estate from the jurisdiction of the Court and has continued ever since to refuse obedience to its mandates."

In Wetmore *v.* Wetmore, 29 App. Div. Rep. (N.Y.), 510-511, Ingraham, *J.*, speaking for the Court, said:

> "*The application was denied below upon the ground that the defendant is in contempt, refusing to obey an order of the Court or to submit himself to its jurisdiction.* Under ordinary circumstances this fact alone would be sufficient to justify the Court in refusing to grant a favor or refusing a person thus situated any incidental relief. He deliberately absented himself from the State, and although he concededly had at that time a sufficient amount of money in his possession with which he could have satisfied at least a portion of the sum that was directed to be paid for the support of his wife and children, he has persistently refused to perform any part of the duty imposed upon him of protecting and supporting those whom he was bound to protect and support, and has refused to make any provision for the support of his wife and children. This conduct, and the disposition shown by the defendant since the divorce was granted, does not entitle him to any favor, and the Court may well hesitate before granting him any relief to which he is not strictly and legally entitled."

In Wetmore *v.* Wetmore, 44 App. Div. Rep. (N. Y.), 223, O'Brien, *J.*, said:

> "Mr. Wetmore did not appear. He vouchsafed no information respecting his mode of life or his necessities, other than such intimations as were made in those affidavits which this court rejected as proof of those matters. It is true that he undertakes to evade this requirement and to excuse his non-appearance as a witness by the statement that he was in contempt for disobedience of the order requiring him to pay the alimony, and that he would have come into the State to be examined before the Referee provided the plaintiff had consented to forego those remedies to which she would be entitled as process for his disobedience of the judgment awarding alimony. That is not an excuse which can avail him. This Court knew from the record on the former appeal that Mr. Wetmore was in contempt of its process, and that fact is fully commented upon in the opinion of the Court (29 App. Div., 511). He was content upon the proceeding before the Referee simply to call the plaintiff as a witness to show that her position in life was changed, and that she had remarried, and that her present husband is a gentleman of high social standing and competent to support her. But the ground upon which the Court of Appeals placed the modification of the judgment was a change in Mr. Wetmore's circumstances and not in his wife's. Of such a change he did not make the required proof before the referee."

In Wetmore *v.* Wetmore, 79 Hun (N. Y.), 269, Judge Barrett said:

> "Every remedy given to the plaintiff by the Code of Civil Procedure for the enforcement of these provisions has been exhausted (see the Continental Trust Co. *v.* Wetmore, 67 Hun, 9). These remedies have proved unavailing, not because of Mr. Wetmore's inability, but because of his factious refusal to comply with the judgment. *His disobedience was intentional, and his purpose to nullify*

the judgment deliberate. To effectuate this purpose he left the State and took with him all his tangible property. In plain words, he fled the jurisdiction, defied our Courts and left his wife and children to starve."

And at page 274:

"Under these circumstances to have apportioned the trust income and allowed Mr. Wetmore unconditionally a part of it for his individual support, would have been a mockery of justice. He has more than enough for his individual support without it. If, however, it were apportioned conditionally, what would necessarily have been the condition? Certainly the payment to the plaintiff from his other property of a sum equivalent to that apportioned to him. The apportionment would then have been a needless formality. But the Court might with propriety make a still more stringent condition, namely, the payment of the entire sum awarded by the divorce judgment. A demand for an apportionment is a demand for equity, and if Mr. Wetmore demanded that equity he should have offered to do the equity of complying with the provisions of the divorce judgment. He cannot, therefore, complain that, while he is in contempt of that judgment, the Court has done the plaintiff the partial justice of impounding the arrears and directing the future application of the entire income, from time to time, as it accrues, to the satisfaction in part of his just obligations."

In Wetmore *v.* Wetmore, 34 Misc. (N. Y.), 643, Scott, *J.*, said:

"It is not necessary, upon this motion, to consider the question argued at length upon the briefs of counsel, whether or not the applicant is technically in contempt of court at the present time. At least his persistent evasion of the decrees and orders of the Court and his unremitting and thus far successful attempts to avoid the payment of alimony to his wife, do not entitle him to ask any favors at the hands of the Court, and afford

excellent reasons why the relief, if any, to be afforded him, should be limited to that to which he appears to be clearly and legally entitled."

In Wetmore *v.* Wetmore, 8 Misc. (N. Y.), 55, 56, Ingraham, *J.*, said:

"Look for a moment at the situation presented here. The judgment of this Court provides that this defendant William B. Wetmore should pay to the plaintiff a sum of money each year. William B. Wetmore is entitled to receive for his own use a sum of money from the defendant trustee. *He has left the jurisdiction of the Court, refuses to obey its judgment, and in consequence of such absence the ordinary remedy provided for the enforcement of that judgment is impracticable* We have thus the obligation of the defendant William B. Wetmore to pay to the plaintiff this sum of money. We also have an equitable obligation of the defendant trustee to pay to the defendant William B. Wetmore the income of this trust fund as it accrues. *In consequence of the voluntary act of the defendant William B. Wetmore in leaving this State, it is impossible to proceed against him by the ordinary methods used to enforce the judgment in the action for divorce.* If he were present and subject to the jurisdiction of this Court there can be no doubt that the Court by a commitment for contempt, could compel him to apply the income from this trust fund to the payment of the amount adjudged to be paid to the plaintiff for alimony; also upon what principle can it be said, that, because he absents himself from this State and voluntarily places himself in such a position that the plaintiff cannot enforce her judgment against him by proceedings for contempt, thereby the Court has lost its power to do what it could do if he were present and submitted himself to its jurisdiction? It is true that no express precedent is cited where such relief has been granted, but neither is there any case cited that holds that the Court has not such power, and, as was

said by the Court of Appeals in the case of the National Bank *v.* Wetmore, 124 N. Y., 248, 'it is for the enforcement of the principle 'that there is no wrong without a remedy' rather than precedent that courts will seek in considering whether any or what remedy may be had in the administration of justice.'"

Third Point.

Neither the claim for alimony nor for maintenance and education of the infant children was a debt provable in bankruptcy, and the discharge in bankruptcy did not relieve the plaintiff in error from payment of arrears of alimony or arrears for the maintenance and education of the infant children.

Audubon *vs.* Shufeldt, 181 U. S., 575.
Dunbar *vs.* Dunbar, 190 U. S., 340.
In re Nowell, 99 Fed., 931.
In re Shepard, 97 Fed., 187.
In re Anderson, 97 Fed., 321.
Turner *vs.* Turner, 108 Fed., 785.
In re Lachemeyer, 1 Nat. Bk. Rep., 270.
In re Garrett, 11 Bk. Rep., 493
Matter of Smith, 3 Amer. Bk. Rep., 18.
Maisner *vs.* Maisner, 62 App. Div. (N. Y.), 286.
Young *vs.* Young, 35 Misc. (N. Y.), 335.
People *ex rel.* Buckle *vs.* Grell, 65 N. Y. Suppl., 522.
Bishop on Marriage and Divorce, Section 837.
And see Tinker *vs.* Colwell, 193 U. S., 473.

Fourth Point.

Under the law of New York alimony provided for by a decree of divorce is not regarded as a debt, or a fixed liability within the meaning of the Bankrupt Act, but as a legal determination of the duty owing from husband to wife.

Romaine *vs.* Chauncey, 129 N. Y., 566.
Wetmore *vs.* Wetmore, 79 Hun (N. Y.), 268; affirmed, 149 N. Y., 520.
Maisner *vs.* Maisner, 62 App. Div. (N. Y.), 286, *supra.*
Code Civil Procedure, N. Y., § 1759.

New York Code of Civil Procedure, Section 1759, relates to divorce actions brought by a wife and provides in part as follows:

"2. The Court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties."

That a judgment for alimony and for the support of the infant children under the New York law *is not a debt, was argued by the plaintiff in error in the equity suit*, which resulted in impounding the income of the trust fund, established in his father's will for his benefit, to the defendant in error.

In speaking of Romaine *v.* Chauncey, this Court in Audubon *v* Schufeldt, *supra*, said at page 579:

> "In Romaine *v.* Chauncey (1892), 129 N. Y., 566, it was held by the Court of Appeals of New York that alimony was an allowance for support and maintenance, having no other purpose, and provided for no other object; that it was awarded, not in payment of a debt, but in performance of the general duty of the husband to support the wife, made

specific and measured by the decree of the Court; and that a court of equity would not lend its aid to compel the appropriation of alimony to the payment of debts contracted by her before it was granted."

In Wetmore *vs.* Wetmore, 79 Hun (N. Y.), 268, the Court at page 271 says:

"Why, it may be asked, should not the income of this trust fund be thus subjected? The *appellants* (plaintiff in error was one) *say, because under the rule laid down in Romaine* v. *Chauncey* (*129 N. Y., 566*), *alimony is not strictly speaking a debt* due to the wife from her husband, nor, consequently, is her claim thereto that of an ordinary creditor. From this postulate the appellants reason that as it is only a creditor who under the statute, can reach surplus income beyond what is necessary for the support of the beneficiary the plaintiff -not being such creditor, is wholly without equity.

The answer to this position is, that the rights of the wife and children do not depend upon mere definitions of the term 'alimony,' and that her and their claim to support is higher and greater than that of an ordinary creditor. The question is not whether these children have become, by operation of law, their father's creditors; nor whether the divorce judgment has transformed the wife and husband into the technical relation of creditor and debtor; but whether the provision duly made for her support and for the support of the children—no matter how it may be styled or what it may be likened unto—shall be enforced.

We have said that the claim of the wife and children to support is higher and greater than that of an ordinary creditor. We mean this in a legal as well as in a moral sense, and for this reason: The beneficiary's wife and children *are included in the personal use to which the income of the trust fund is to be applied.* All the cases where surplus income has been applied to the claims of creditors limit the surplus to what may remain after making due provision for the suitable support and maintenance of the *cestui que trust and those dependent upon him.* The Court first determines what is necessary for the support, not of the debtor alone, but of him *and his family* (Williams *vs.* Thorn, 70 N. Y., 270; Tolles *vs.* Wood, 99 *Id.*, 618; McEvoy *vs.* Appleby, 27 Hun, 44)."

In Wetmore *v.* Wetmore, 149 N. Y., 520, it will be seen from the briefs of counsel as reported that the trustee under the will of Samuel Wetmore contended in the Court of Appeals that under the judgment of divorce the defendant in error was not a creditor of the plaintiff in error, and in the argument for the plaintiff in error in that case he contended that if the judgment for alimony constituted a debt that he was entitled to the protection afforded by the statute in regard to allowing him a sum for maintenance and support out of the income of the trust fund. The respondent on that appeal (the defendant in error here) contended as in the lower courts that she was entitled to impound the trust fund independently of any statute relating to creditors' action, under the general powers of the Court as a court of equity under the peculiar circumstances of that case. The Court in writing the opinion recognized this latter claim, saying:

"The will creating the trust for the benefit of William makes no mention of his wife. And yet, owing to their unity of person and his duty to support her, equity will not permit the interposition of creditors until there is a surplus over and above that which is necessary for the support of himself, his wife and infant children. (Williams *v.* Thorn, 70 N. Y., 270: Tolles *v.* Wood, 99 N. Y., 616; Sillick *v.* Mason, 2 Barb. Chan., 79).

Equity will not feed the husband and starve the wife. Neither will it favor the wife to the detriment of the husband. Treating them as one, and both entitled to support out of the income of the estate, so far as creditors are concerned, furnishes a just rule and a safe basis for adjustment where the question of support arises between themselves."

It is contended by the plaintiff in error that the defendant is regarded as a judgment creditor; in support of which contention the opinion of the Court in Wetmore *vs.* Wetmore, 149 N. Y., 52, is cited. We do not understand that such opinion so holds, but on the contrary it approves Romaine *vs.* Chauncey.

In Maisner *v.* Maisner, 62 App. Div., N. Y., 286 (*supra*), which came before the Court on a question under the present Bankruptcy Act similar to the one now presented, namely, as to whether a discharge in bankruptcy relieves the bankrupt from payment of past due alimony, &c., it was contended, as here, that the opinion in the Wetmore case held that alimony was a debt, and in that regard the Court, in holding that past due alimony was not discharged, says:

"IT WILL BE NOTICED THAT IN SOME OF THE OPINIONS of the judges in the bankruptcy courts, their views are based upon the nature of alimony as defined by the tribunals of the States within which such bankruptcy courts exercise jurisdiction, and it has been argued that under the decisions of the courts of the State of New York, alimony has been declared to be a debt due from the husband to the wife and enforciable as a debt. To sustain this position, we are referred among others to the case of Wetmore *v.* Wetmore (149 N. Y., 520), in which it was held that the effect of a judgment in an action for divorce awarding alimony to a wife directed to be paid by the husband, is to make her a creditor of the husband, within the intention of the Statute of Uses and Trusts, and that after having exhausted the remedy given her by the Code to obtain payment of alimony she is entitled to the remedies of a judgment creditor given by that statute, and in the opinion of the Court it is said that after the entry of the judgment awarding alimony, the husband is in effect a debtor owing his wife the amount adjudged and determined by the decree. BUT NEITHER THE WETMORE CASE NOR OTHERS CITED BY THE APPELLANT HAVE DECLARED THE ALLOWANCE OF ALIMONY TO BE THE ENFORCEMENT OF A DEBT DUE FROM A HUSBAND TO HIS WIFE, NOR PUT A JUDGMENT AWARDING IT IN THE CATEGORY OF ORDINARY MONEY JUDGMENTS. The nature of alimony is defined in Romaine *v.* Chauncey (129 N. Y., 566), as being incidental to a decree of divorce in favor of a wife and simply an allowance for her support and maintenance. It is an admeasurement by the court of the marital obligation of support which obligation is made specific and the allowance becomes a debt only in the sense that the general duty over which the husband previously

had a discretionary control has been changed into a specific duty. We do not understand the Wetmore case as being intended to establish any other view of the nature of alimony."

The following language from the opinion by Judge Baker in the Matter of Turner is also adopted in Maisner *v.* Maisner, *supra:*

"We have seen that alimony is not a debt reduced into judgment. It is a sum of money awarded for the wife's support in the enforcing of a marital duty, and it does not constitute a debt in the true sense of that word. The Court will look beyond the form of the judgment. It will look at the nature of the liability, the original cause of action. The duty of marital support springs out of the contract of marriage and continues until dissolved by death or the judgment of a competent court. A discharge in bankruptcy will not release a bankrupt from his obligation of support. The wife, during the marital relation, cannot prove her claim for support against the estate of her bankrupt husband. If a discharge will not release the bankrupt husband from his liability to furnish his wife support, why should such discharge absolve him from the performance of this duty when, on account of the violation of the marriage contract, a court has decreed the amount of money that he should pay in satisfaction of this duty?"

Under the authorities heretofore cited the husband has not been regarded as relieved from the payment of alimony by virtue of his discharge in bankruptcy. Such was the rule under the old Bankruptcy Act, as well as under the present. There are a few decisions to the contrary, but they would seem to turn upon the fact that under the law of the jurisdiction where given, alimony was treated more in the nature of a debt than a duty. For instance see *In re* Houston, 94 Fed , 119, which must be deemed to be questioned if not overruled by Audubon *vs.* Shufeldt, *supra.*

If the discharge in bankruptcy relieved the plaintiff in error from the payment of accrued alimony

and moneys due for the support of his children, they would be deprived of collecting the same from a fund over which the Bankruptcy Courts had no control under the decisions of the State of New York.

The sequestration action by which the income of the trust fund was impounded, provided a fund applicable to the payment of arrears as they might be due. The Bankruptcy Court had no control over the income from that fund.

In Butler *v.* Baudouine, 84 App. Div., 215, it was held that under the fifth paragraph of Subdivision A of Section 70 of the Bankruptcy Act, which vests a trustee in bankruptcy with all the estate and property of the bankrupt "which prior to the filing of the petition he could by any means have transferred or which might have lawfully been sold under judicial process against him," is not entitled to commence an action under Section 78 of the New York Real Property Law, which provides that where a trust is created for the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of the beneficiary's creditors in the same manner as other personal property which cannot be reached by execution, as such surplus is only available to judgment creditors who have exhausted their remedies at law. A wife, however, as shown above comes in ahead of such creditors.

If the argument is sound that the provisions for alimony and support were a fixed liability within the meaning of the Bankrupt Act, because the Courts of New York have not power to change its provisions great injustice would be done in regard to persons in that State, as the subject of alimony and the enforcement of its payment is varied.

In Maisner *v.* Maisner (*supra*), the Court says:

"When it (alimony) is awarded, the Court takes into its own hands the regulation of the duty of the

husband to support his wife, and it may provide in its decree for a modification of its terms if it so chooses. It has the power to compel obedience to the decree by other methods than those ordinarily resorted to to enforce a judgment. It may require the husband to give security for the payment from time to time of the alimony awarded or it may cause his personal property and the rents and profits of his real property to be sequestrated and may appoint a receiver thereof, or upon default in the payment of alimony, under certain circumstances it may enforce payments by proceedings for contempt, as in the case now before us."

If the question should turn upon whether or not there is power in the Court to modify a decree it can readily be seen that amounts due under New York decrees granting leave to apply for a modification thereof would not be discharged, whereas New York decrees without such provisions would. Moreover, even though the Court may have power to modify a decree, still, until such discretion is exercised, the amount due is equally as much a fixed liability as is the amount due under a decree over which the Court has not such discretion.

A decree providing for alimony is not in its nature an ordinary judgment for a fixed liability. While the Court could not, perhaps, change the amount, it could indirectly preclude the plaintiff from recovering the amount. The manner of enforcing alimony is provided for by Sections 1772 and 1778 of the New York Code of Civil Procedure which in 1899 were as follows:

SECTION 1772 SUPPORT, MAINTENANCE, ETC., OF WIFE AND CHILDREN. SEQUESTRATION.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion also direct him to give reasonable security in such a manner, and within such a time, as it thinks proper, for the payment, from time to time of the sums of money required for that

purpose. If he fails to give the security or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order made as prescribed in Section 1769 of this act; the court may cause his personal property and the rents and profits of his real property to be sequestered; and may appoint a receiver thereof. The rents and profits and other property, so sequestered, may be from time to time, applied under the direction of the court to the payment of any of the sums of money, specified in this section as justice requires.

SECTION 1773 *Id.*: WHEN ENFORCED BY PUNISHMENT FOR CONTEMPT.

Where the husband makes default in paying any sum of money specified in the last section as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the Court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the Court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him as prescribed in title third of chapter seventeenth of this Act. Such an order to show cause may also be made without any previous sequestration or direction to give security where the Court is satisfied that they would be ineffectual.

If a husband owing alimony is punished as in contempt of Court for not paying the alimony prescribed, the Court may commit him under Section 1773, and he may then upon application to the Court apply for his release upon showing that he is unable to pay the amount due, under Section 2286 of the New York Code of Civil Procedure and which section is as follows:

SECTION 2286, WHEN COURT MAY RELEASE OFFENDER.

Where an offender, imprisoned as prescribed in this title, is unable to endure the imprisonment or

to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the Court, the judge or referee or, where the commitment was made as prescribed in section 2457 of this act, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order directing him to be discharged from the imprisonment.

The effect, therefore, is that while the Court does not change the amount of alimony due it releases the husband from its payment.

It was doubtless from the fact that the nature of alimony or the effect of a decree awarding alimony was regarded differently in various States, which might in some bring the judgment within the class of debts specified in the Bankruptcy Act, as being discharged, and in some States not, and in view of the decisions of this Court that alimony could not be discharged in bankruptcy, that Congress, to harmonize the effect of the marriage relation so that it should be uniform throughout the United States, beyond all question amended by Act of February 5, 1903, Section 17 of the Bankruptcy Act, so that a discharge in bankruptcy should not release a bankrupt "for alimony due or to become due or for maintenance or support of wife or child."

That the amendment to the Bankruptcy Act passed in 1903, providing that a debt due or to become due for alimony or for the maintenance and support of wife or child did not imply that such obligations were dischargeable under the Act as it formerly stood see Dunbar *vs.* Dunbar, 190 U. S., 340, where this Court, at page 353, held that that amendment only shows the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife or children, and in which case this Court held that moneys due under a contract for the support of wife and children were not released by the bankrupt's discharge, such contract being governed by the law as it stood prior to the amendment.

Fifth Point.

If the effect of a decree containing provisions for alimony and for support and maintenance of children is to be regarded as making the husband and father debtor to the wife and children for such amounts, even then the discharge in bankruptcy would not release the plaintiff in error from such obligation.

It has frequently been held that the courts will examine into the inception of an obligation when it is claimed that such obligation is discharged in bankruptcy. Alimony is awarded to an innocent wife merely for her support and maintenance, but the inception of its award and the reason it is definitely measured by the Court is on account of the wilful and malicious injury to the person and property of the wife. That the acts upon which the decree contained in this record were wilful appeared from the verdict of the jury at page 58, where it found that the plaintiff in error had committed all the acts charged with the exception of one. From the complaint, at page 38, it will appear that fifteen specific acts were set forth. That such acts were wilful and malicious as against the wife and children and invaded the person of the wife and the property of the wife and children is self evident.

The words of Bartlett, *J.*, in Colwell *v.* Tinker, 169 N. Y., 531, which was an action for criminal conversation, and where the effect of such acts upon the property and rights of a husband is stated are equally applicable to the injury done to a wife by her husband's adulterous intercourse. He says:

> "While loss of service is usually pleaded in this form of action, yet its real foundation is the personal injury inflicted upon the husband. The offense charged is a most grievous wrong against social order and society; it strikes at the foundations of the home and

the legitimacy of offspring. The husband, who is entitled to live with his wife and enjoy her society in the marriage relation, finds himself humiliated and to a certain extent, disgraced by a public scandal; the marriage bed is dishonored; his domestic peace and comfort are destroyed and he is subjected to great mental suffering.

* * * * *

A person voluntarily invading and destroying the marriage relation is guilty of a wilful, wanton act, and it is not necessary to prove that he was moved by hatred, revenge or passion towards the husband. The law in such a case implies malice, and the judgment that follows is for both a wilfull, and malicious injury to the person and property of another.

The policy of the Bankrupt Law is to discharge the honest and unfortunate debtor from his contract obligations, and not free him from judgments involving his fraud, which implies moral turpitude or intentional wrong, or judgments for wilful and malicious injuries to the person or property of another."

As said by Bishop,

"A breach of marriage duties, such as authorizes divorce, is a civil tort, and the divorce suit is in essence an action of tort, though not technically known by this name."

Bishop on Mar. and Div., Vol. 2, p. 220.

The law does not permit actions between husband and wife for torts of such a nature.

Amer. & Eng. Encyc. of Law, 2d Ed., Vol. 15, p. [redacted].857

The only remedy therefore which a wife has for a breach of marital duties by the husband is an action for divorce or separation according to the magnitude of the act. The commission of such acts are, nevertheless, wilful and malicious injuries to the person and property of the wife, and it is on account thereof that the Court, in freeing the wife,

decrees the measures of the husband's obligation to support and maintain the wife.

It would, therefore, follow that if the decree for alimony and support of his children changed the guilty husband's obligation to that of a debt, it would be a debt incurred for his wilful and malicious injury to the person or property of others, and, therefore, not discharged under Section 17 of the Bankruptcy Act.

Sixth Point.

The writ of error should be dismissed, or the order brought up for review affirmed.

Respectfully submitted,

FLAMEN B. CANDLER,
Attorney for Defendant in Error.

Dated October 10th, 1904.

Flamen B. Candler
of Counsel for Defendant
in Error.

Supreme Court of the United States,

OCTOBER TERM, 1904.

WILLIAM B. WETMORE, Plaintiff in Error, AGAINST ANNETTE B. MARKOE (formerly Annette B. W. Wetmore), Defendant in Error.	No. 56,

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT IN ERROR SUBMITTED BY PERMISSION OF THE COURT.

FIRST POINT.

The argument of the plaintiff in error in the first point of his reply brief, tending to show jurisdiction in this Court, is not sound.

It is contended by the plaintiff in error in his reply brief that "The application made to the Special Term of the Supreme Court of the State of New York was made as of right and was not addressed to the favor of the Court."

In support of that contention, reference is made to Section 1268 of the Code of Civil Procedure of the State of New York.

A perusal of that section will show that the statutory authority to make application to the Court is only "for an order directing the judgment *to be canceled and discharged of record.*"

That section refers simply to a money judgment that *has been duly docketed* and which is released by a discharge in bankruptcy.

In the case at bar the judgment has not been docketed, except in respect to several installments of alimony and of moneys for the maintenance and education of the three children, amounting to $4,500, upon which the sequestration action was predicated and which installments had been paid long before the bankruptcy proceedings were instituted (see Record, page 109*j*.)

It will further be noted that the application was not made to have any judgment *canceled or discharged of record*, as authorized by that section, but the application was solely and distinctly for the obtaining of an *injunction restraining the collection of the amount which was due and unpaid at the time the petition in bankruptcy was filed* (see Record, p. 3). As the effect of the discharge in bankruptcy upon the arrears of alimony could have been determined in an action instituted by the plaintiff in error or by contempt proceedings instituted under the judgment of divorce, it was entirely discretionary with the Special

Term of the Supreme Court whether or not it would entertain an application by motion for an injunction. In fact, it is doubtful if the Court had jurisdiction to entertain such an application.

The judgment of divorce which was dated on the first day of April, 1892, was final, never having been modified or reversed upon appeal or otherwise.

We have stated that it is doubtful if the Court had jurisdiction to grant the application made by the plaintiff in error, and in that regard we again state that such application *was solely for injunctive relief.*

Under the law of New York, the only authority, which the Courts of that State have to issue an injunction, temporary or permanent, is found in the Code of Civil Procedure.

Spears *v.* Mathews, 66 N. Y., 127.
Jackson *v.* Bunnell, 113 N. Y., 216.

In Spears *v.* Mathews, *supra*, the Court of Appeals at page 128, referring to Fellows *v.* Heerman, previously decided by that Court, said:

> " The Court were of the opinion that the code defined and limited the power of the Court in respect to granting injunctions, and that the right to an injunction in any case, if it existed, was to be found in the provisions of the code. This decision was referred to in Erie RailwayCompany *v.* Ramsey (45 N. Y., 637), as establishing this proposition. The question is, therefore, *res adjudicata*

and we do not deem it useful to restate the grounds upon which this Court based its decision."

In Jackson *v.* Bunnell, *supra*, at page 219, the Court said:

"The Code has abolished the writ of injunction and substituted as a provisional remedy an injunction granted by an order (Code of Civ. Pro., § 602). It can be awarded only in the cases and in the manner specifically prescribed and is impliedly forbidden in any others (Fellows *v.* Heerman, 13 Abb. Pr. [N. S.], 9)."

It is submitted that under the law of New York no injunction based upon affidavits, as in the case at bar, can be granted in an action after the entry of final judgment, especially when such injunction would affect the judgment.

Bell *v.* City of Rochester, 30 N. Y. Suppl., 365.

Jackson *v.* Bunnell, 113 N. Y., 216, *supra.*

Spears *v.* Mathews, 66 N. Y., 127, *supra.*

In Bell *v.* City of Rochester, 30 N. Y. Suppl., 365, *supra*, the Court says :

"A court of equity derives its authority to grant an injunction order from the Code of Civil Procedure, and there is no authority in the Code authorizing the granting of an in-

junction upon affidavits after the final judgment has been obtained. It was held in Jackson *v.* Bunnell, 113 N. Y., 219, that under the laws of this State there is no authority for granting an injunction after final judgment. The restraint, if any, must be contained in the final judgment or it cannot be granted at all (Gardner *v.* Gardner, 87 N. Y., 18; Code of Civ. Pro., § 206; High Inj., Section 1591)."

There is no authority in the Code of Civil Procedure of New York which in any way authorizes or permits the making of an application in an action for a restraining order perpetually enjoining the enforcement of a final judgment previously made therein. Such relief can only be granted in an original action.

In Jackson *v.* Bunnell (*supra*) the Court, at page 220, says :

> "But a permanent injunction is in no sense a provisional remedy. It is always and must be final relief. A court of equity may grant it *in an action where the pleadings show its necessity, and the remedy is asked as an element of the final relief sought; but after judgment which does not award it, and which judgment is a final disposition of the action, there can be no permanent injunction granted upon affidavits and an order. In High on Injunctions* (§ *1591*), *it is said that there is no precedent for granting a permanent injunction upon affidavits.*"

There is nothing in Section 1268 set forth in the reply brief of the plaintiff in error, which

confers jurisdiction upon the Court to grant any injunction on the ground that a judgment debtor has been discharged in bankruptcy. The only relief there authorized is an application to *cancel and discharge a judgment which has been docketed*, and an application for an injunction is not such an application.

It would therefore follow that the application made by the plaintiff in error was not one which he could make as of right, and even though the Conrt had jurisdiction, which it did not, it would only be of such a character as to permit it to entertain the application for an injunction as a favor, for if it refused to hear the application or to grant the injunction the refusal of the Court would simply be relegating the plaintiff in error to a plenary action.

The case of Hovey *v.* Elliott, 167 U. S., 409, cited in the reply brief of the plaintiff in error has therefore no application. In that case it was merely held that the Court could not strike out a defendant's answer and enter a decree *pro confesso* on the merits, from the mere fact that he was in contempt of Court, holding that his right to be heard was such that the Court could not take it away even though he was in contempt. The opinion in that case, however, distinctly recognizes the fact that

> "The Court of Chancery commonly refused to hear a defendant in contempt when asking at their hands a favor" (p. 423).

SECOND POINT.

In this supplemental brief on the question of the plaintiff in error being in contempt, we simply desire to call the attention of the Court to the fact that the defendant in error was not proceeding against the plaintiff in error when he applied to the Special Term of the Supreme Court of the State of New York for an order perpetually restraining proceedings to collect the $19,221.60 due for arrears of alimony and for the support, maintenance and education of his three infant children, which is the order he now seeks to review in this Court.

If the defendant in error had instituted proceedings against the plaintiff in error in regard to such arrears and she had insisted that the plaintiff in error should not be heard because of his contempt, it might then be argued that in such case he could reply that he should first be adjudged to be in contempt by some order or judgment of the Court before he should be deprived of the right to defend himself. But that is not the manner in which the questions here arise, for the plaintiff in error on this application is asking affirmative relief in his favor, while as a matter of fact he is actually in contempt of the Court, as shown by the quotations from the

opinions in this cause of the different judges as set forth in the second point of the main brief of the defendant in error.

We believe we are sustained in this position by the case cited by the learned counsel for the plaintiff in error in his reply brief decided by this Court, which held that a pleading of a defendant who had been proceeded against could not be stricken out and he be deprived of the right to defend himself against the suit, merely because he was in contempt of court.

See Hovey *v.* Elliott, 167 U. S., 409, *supra*, which case recognizes that when a party asks a favor a court of equity can properly refuse to hear him while in contempt.

THIRD POINT.

As suggested on the argument in addition to what we have said on the subject in the main brief for the defendant in error, we submit that no Federal question is here presented to the Court, because no action or proceeding has been taken by the defendant in error, which has deprived the plaintiff in error of any rights which he has or may claim to have under his discharge in bankruptcy, and which has resulted in any final judgment or decree.

In other words, there is no practical question before the Court which enables the plaintiff in

error to maintain his writ of error on the ground that a Federal question is involved, which has been decided against him.

As already shown, the plaintiff in error could not make his application for injunctive relief as a matter of strict right, and that there was no authority in the Court to grant a permanent injunction upon affidavits after final judgment. It has also been stated that the plaintiff in error might commence an original action for the purpose of having his rights under the decree of bankruptcy determined. His present application by motion papers is not a proper way to raise the question, nor is it made at a proper time, as no proceedings were instituted against him by the defendant in error for the collection of any arrears. It is a well settled rule of this Court that it can review a judgment only when the right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States were specially set up or claimed in the State court *at the proper time and in the proper way.*

Sayward *vs.* Denny, 158 U. S., 180.
Chappell *vs.* Bradshaw, 128 U. S., 132.
Morrison *vs.* Watson, 154 U. S., 111.
Bobb *vs.* Jamison, 155 U. S., 416.
Leeper *vs.* Texas, 139 U. S., 462.
Spies *vs.* Illinois, 123 U. S., 131.
Baldwin *vs.* Kansas, 129 U. S., 52.
Brown *vs.* Massachusetts, 144 U. S., 573.
Duncan *vs.* Missouri, 152 U. S., 377.

Moreover, the order now sought to be reviewed is not a final judgment or decree within the Federal statutes nor within the decisions of this Court. The application for injunctive relief is made upon the simple fact that the plaintiff in error anticipates that the defendant in error may institute some proceedings against him for the collection of arrears (Record, p. 9). No such proceedings have been commenced by the defendant in error. The position of the plaintiff in error is not as strong as if process had been issued for the collection of the arrears. If such steps had been taken by the defendant in error and execution issued, the denial of an application made by the plaintiff in error to vacate such execution on the ground that the discharge in bankruptcy released the payment of such arrears could not be reviewed by this Court.

A writ of error will not lie to review an order of the highest court of a State overruling a motion to quash an execution as such order is not a final judgment within the contemplation of the judiciary act.

Loeber *vs.* Schroeder, 149 U. S., 580.

If a writ of error will not lie to review such an order, it is apparent that a writ of error will not lie to review an order denying an application to restrain the issuing of execution.

FOURTH POINT.

The judgment of divorce, so far as it contains provisions for alimony and for the payments to be made for the support, maintenance and education of the infant children, is not a fixed liability evidenced by a judgment.

To be a fixed liability the judgment must be for a specific sum, specifically determined to be due. If the plaintiff in error after the entry of judgment (say within a year thereof) had desired to relieve himself from any obligations thereunder and to pay the same, so far as it made provision for payment to the defendant in error, he could not have done so, because the judgment did not fix any specific amount which he could pay, the amount due being contingent upon the happening of various events, namely: the plaintiff in error might have died and his death would discharge the future operation of the judgment; the defendant in error might have died, after which time nothing would be due for further alimony; one, two or all of the three children might have died before attaining their majority, and the death of any child would have relieved the plaintiff in error from payment of $1,000 a year for the future maintenance and education of that child, and the same in regard to the other children in case of their deaths. If the plaintiff in error had desired to satisfy the judgment, so far

as alimony is concerned, by requiring the defendant in error to accept a gross sum based upon expectancy of life, she could not have been required to accept the same. Therefore, at no time was there any fixed amount due under the judgment, nor was there any way of telling what amount might ultimately be due.

FIFTH POINT.

It was not the intention of Congress in enacting the Bankruptcy Law, to discharge a husband from claims for arrears of alimony or arrears due for the maintenance and education of infant children as awarded by a judgment of divorce.

Nor are such claims, though provided for in a judgment of divorce, "A fixed liability as evidenced by a judgment" within the meaning of § 63*a* of the Bankruptcy Act of 1898.

See the following cases cited under Third Point on page 22 of the brief of defendant in error:

Audubon *vs.* Shufeldt, 181 U. S., 575.
Dunbar *vs.* Dunbar, 190 U. S., 340.
In re Nowell, 99 Fed., 931.
In re Shepard, 97 Fed., 187.
In re Anderson, 97 Fed., 321.
Turner *vs.* Turner, 108 Fed., 785.

In re Lachemeyer, 1 Nat. Bk. Rep., 270.
In re Garrett, 11 Bk. Rep., 493.
Matter of Smith, 3 Amer. Bk. Rep., 68.
Maisner *vs.* Maisner, 62 App. Div. (N. Y.), 286.
Young *vs.* Young, 35 Misc. (N. Y.), 335.
People *ex rel.* Buckle *vs.* Grell, 65 N. Y. Suppl., 522.
Bishop on Marriage and Divorce, Section 837.
And see Tinker *vs.* Colwell, 193 U. S., 473.

This is especially true as regards the award of alimony and for maintenance and education of infant children under a judgment of divorce granted in the State of New York.

In Maisner *v.* Maisner, 62 App. Div. (N. Y.), 286, *supra*, it was decided that "Arrears of alimony accruing before the filing of a petition by, or the granting of a discharge in bankruptcy proceedings, instituted by the husband under the Federal Bankruptcy Law, do not constitute a debt provable in the bankruptcy proceedings and are not covered by the discharge issued therein."

In that case it was unsuccessfully contended (as it is contended in this case by the plaintiff in error), that alimony was a fixed liability as evidenced by a judgment absolutely owing at the time of the filing of the petition whether then payable or not, and in that case the Court expressly

held that alimony was not a provable debt under Section 63 of the Bankruptcy Law.

In Dunbar *vs.* Dunbar, 190 U. S., 340, *supra*, Mr. Justice Peckham, writing the opinion of the Court, said at page 344:

> "Had the provisions of this contract, so far as contracting to pay money for the support of his wife is concerned, been embodied in the decree of divorce, which the husband obtained from his wife in Ohio on the ground of desertion, the liability of the husband to pay the amount as alimony, notwithstanding his discharge in bankruptcy, cannot be doubted (Audubon *vs.* Shufeldt, 181 U. S., 575)."

and after speaking of the contract, the subject of that action, which took the place of provisions for alimony and the support of children usually contained in judgments of divorce, and after considering the subject discussed generally in the case, said at page 349:

> "Section 63*a* provides for debts which may be proved which, among others are, (1) 'A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest'; (4) 'founded upon an open account, or upon a contract express or implied.'"

and then said at page 350:

"In Section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph B, however, adds nothing to the class of debts which might be proved under paragraph A of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of Section 63*a*, to be liquidated as the Court should direct.

We do not think that by the use of the language in Section 63*a* it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.

The language of Section 63*a* of the Act of 1898, differs from that contained in the Bankruptcy Act of 1867, and also from that of 1841. The Act of 1867, Section 19, 14 Stat., 517, 525, carried into the Revised Statutes as Section 5068, provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt and permitted applications to be made to the Court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the Court should order and the creditor was then to be allowed to prove for the amount so ascertained.

Section 5 of the Act of 1841, 5 Stat., 440, provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act. But neither

the Act of 1841 nor that of 1867 would probably cover the case of such a contract as the one under consideration."

and at page 352:

"In the case of *In re* Hubbard, 98 Fed. Rep., 710, the District Court of Illinios held that a discharge in bankruptcy did not release the bankrupt from the obligation to obey an order made by a State court requiring him to pay a certain sum for the support of his minor children. Kohlsaat, District Judge, said:

'The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness, but it was not intended to, nor does it, subvert the higher rule which casts upon a parent the care and maintenance of his offspring. The welfare of the State, as also every principle of law, statutory, natural and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors, as well as all citizens, are interested in the enforcement of this rule.'

As the defendant would still remain liable for the support of his minor children, even if discharged from this contract under the act, and he would remain liable for past support, why should it be held that Congress intended that such a contract, to do what the law enjoins upon him as a duty, should be released? There is no language in the act which plainly so provides and we ought not to infer it.

The amendments to the bankruptcy act

passed in 1903, 32 Stat., 797, contain an amendment of Section 17 of the Act of 1898, which relates to debts not affected by a discharge, and it provides, among those not released by a discharge in bankruptcy, a debt due or to become due for alimony or for the maintenance or support of wife or child. It is true that the provisions of the amendatory act are not to apply to cases pending before their enactment. They are only referred to here for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife or children."

In Blake, Moffitt & Towne *v.* Francis-Valentine Co., 89 Fed. Rep., 691, the Court at page 693 says:

"The national bankruptcy act establishes a uniform system, and regulates, in all their details, the relations, rights and duties of debtor and creditor. It should be interpreted reasonably and according to a fair import of its terms, with a view to effect its objects and to promote justice. Black, Bankr., 274; *In re* Muller, Fed. Cas. No. 9,912; Silverman's Case, Fed. Cas. No. 12,855."

To the same effect is Southern Loan & Trust Co. *v.* Benbow, 96 Fed., 514, where the Court at page 528 says

"that the Bankruptcy Act is remedial and should be interpreted reasonably and according to a fair import of its terms, with a view to effect its objects and to promote jus-

tice. *In re* Bruss-Ritter Co., 90 Fed., 651; *In re* Christy, 3 How., 292; Nugent *v.* Boyd, *Id.*, 426; Houston *v.* Bank, 6 How., 504)."

SIXTH POINT.

We therefore respectfully ask on behalf of the defendant in error that, unless the writ of error shall be dismissed, that the order sought to be reviewed in this Court be affirmed.

Dated November 14, 1904.

Respectfully submitted,

FLAMEN B. CANDLER,
Attorney for Defendant in Error,
No. 48 Wall Street,
Borough of Manhattan,
City of New York,

WILLIAM JAY,
FLAMEN B. CANDLER,
ROBERT W. CANDLER,
Of Counsel.

Supreme Court of the United States.

No. 56.—October Term, 1904.

William B. Wetmore, Plaintiff in Error,
vs.
Annette B. Markoe (formerly Annette B. Wetmore).
} In error to the Supreme Court of the State of New York.

[December 19, 1904.]

On June 12, 1890, an action for divorce and alimony was begun by Annette B. W. Wetmore, wife of the plaintiff in error, in the Supreme Court of the State of New York, and on April 1, 1892, at special term, the plaintiff in error was found guilty of adultery as charged in the complaint, and a divorce was granted upon that ground to the defendant in error. The divorce was absolute, and awarded to the wife the custody and care of the three minor children of the marriage, and also, as alimony, the sum of $3,000 per annum so long as she should live, to be paid in quarterly instalments of $750 each on the first day of the months of July, October, January and April of each year. There was also granted to the wife the sum of $3,000 annually, being $1,000 for the education and maintenance of each of the three minor children, to be paid in quarterly instalments, until such children should arrive at the age of twenty-one years respectively. Plaintiff in error was also required to give security for the payment of the alimony awarded. The decree did not reserve any right of subsequent modification or amendment. On January 13, 1899, there was due to the wife from the plaintiff in error, for arrears in alimony and allowance under the decree, the sum of $19,221.60. Upon that day, upon application to the District Court of the United States for the Eastern District of Pennsylvania, the plaintiff in error was adjudicated a bankrupt. The defendant in error made no proof of her claim for alimony in the bankrupt proceedings. On June 21, 1900, the plaintiff in error was granted a discharge from all debts and claims provable under the bankruptcy act. On December 12, 1901, plaintiff in error sued out a writ in the Supreme Court of the State of New York for an order enjoining and restraining all proceedings on behalf of the defendant in error for the collection of the arrears of alimony and allowance aforesaid. This application was denied, upon the ground, as it appears from the memorandum of the judge who rendered the decision, that the arrears of alimony were not discharged in bankruptcy. From the order denying the application an appeal was taken by the plaintiff in error to the appellate division of the Supreme Court of the State of New York, where the order below was affirmed. The plaintiff in error thereupon

appealed to the Court of Appeals of the State of New York, and on June 27, 1902, the appeal was dismissed for want of jurisdiction, without any judgment of affirmance or reversal upon the merits. A writ of error was sued out seeking in this court a reversal of the judgment of the Supreme Court of the State of New York.

Mr. Justice DAY delivered the opinion of the Court.

It is conceded in argument by counsel for the plaintiff in error that this case would be within the decision of this court in *Audubon* v. *Shufeldt*, (181 U. S. 577,) if the judgment for alimony had been rendered in a court having control over the decree with power to amend or alter the same. It is insisted, however, that there being in this case no reservation of the right to change or modify the decree, it has become an absolute judgment beyond the power of the court to alter or amend, and is therefore discharged by the bankruptcy proceedings. (*Walker* v. *Walker*, 155 N. Y. 77; *Livingston* v. *Livingston*, 173 N. Y. 377.) It may be admitted to be the effect of these decisions of the New York Court of Appeals that, in the absence of any reservation of the right to modify or amend, the judgment for alimony becomes absolute. The question presented for decision, in view of this state of the law, is, has the decree become a fixed liability evidenced by a judgment and therefore provable against the estate of the bankrupt, within the protection of the discharge in bankruptcy? Section 63 of the act of 1898 provides:

"SEC. 63. Debts which may be proved.—

"Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

It is not contended that this section includes instalments of alimony becoming due after the adjudication, but the contention is that prior instalments have become an existing liability evidenced by the judgment and therefore a provable debt. While this section enumerates under separate paragraphs the kind and character of claims to be proved and allowed in bankruptcy, the classification is only a means of describing "debts" of the bankrupt which may be proved and allowed against his estate.

The precise question, therefore, is, is such a judgment as the one hereunder consideration a *debt* within the meaning of the act? The mere fact that a judgment has been rendered does not prevent the court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment. (*Boynton* v. *Bull*, 121 U. S.

457, 466.) The question presented is not altogether new in this court. In the case of *Audubon* v. *Shufeldt, supra,* Mr. Justice Gray, delivering the opinion of the court, said:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by the court at any time, as the circumstances of the parties may require. The decree of a court of one State, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another State, and may, therefore, be there enforced by suit. *Barber* v. *Barber,* (1858) 21 How. 382; *Lynde* v. *Lynde,* (1901) 181 U. S. 183. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction."

In the same opinion Mr. Justice Gray quoted from *Barclay* v. *Barclay,* (184 Ill. 375,) in which case it was adjudged that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy:

"The liability to pay alimony is not founded upon contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the State where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required by the decree. Hence such alimony cannot be regarded as a debt owing from husband to wife, and, not being so, cannot be discharged by an order of the bankruptcy court."

It is true that in the cases referred to the decrees were rendered in courts having continuing control over them, with power to alter or amend them upon application, but this fact does not change the essential character of the liability nor determine whether a claim for alimony is in its nature contractual so as to make it a debt. The court having power to look behind the judgment, to determine the nature and extent of the liability, the obligation enforced is still of the same character notwithstanding the judgment. We think the reasoning of the Audubon case recognizes the doc-

trine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty and enforces it against him by means of legal proceedings.

It is true that in the State of New York at the time this decree was rendered there was no power to modify or alter the decree for alimony and allowance in the absence of special reservation. But this does not change the grounds upon which the courts of the State proceeded in awarding the alimony and allowances. In the case of *Romaine* v. *Chauncey*, (124 N. Y. 566,) it was held that alimony was awarded, not in the payment of a debt, but in the performance of the general duty of the husband to support the wife. This case was quoted with approval by Mr. Justice Gray in *Audubon* v. *Shufeldt*, *supra*.

In *Walker* v. *Walker*, (155 N. Y. 77,) and *Livingston* v. *Livingston*, (173 N. Y. 377,) the effect of the holdings is that a judgment for alimony, in the absence of reservation, is a fixed and unalterable determination of the amount to be contributed to the wife's support after the decree, and is beyond the power of the court to change even under the authority of subsequent legislation. These cases do not modify the grounds upon which alimony is awarded, and recognize that an alimony decree is a provision for the support of the wife, settled and determined by the judgment of the court.

In the case of *Dunbar* v. *Dunbar*, decided by this court at the October term, 1902, (190 U. S. 340,) it was held that a contract made after divorce between husband and wife, by which the former agreed to pay the latter a certain sum of money annually for her support during her life, or so long as she remained unmarried, and also to pay a certain sum of money to her annually for the support of the minor children of the marriage, whose custody was awarded to the mother, was not discharged by a subsequent proceeding and discharge in bankruptcy. It was further held that the sum agreed to be paid for the support of the minor children was but a recognition of the liability of the father for their support, and that the fact that the annual instalments were made payable to the wife made no difference in the character of the obligation. Of this feature of the contract the the court, speaking by Mr. Justice Peckham, said:

"In relation to this part of the husband's contract to pay for the support of his minor children until they respectively become of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation

continues during their minority. We may assume this obligation to exist in all the States. In this case the decree of the court provided that the children should remain in the custody of the wife, and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from the obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do should be discharged in that way. As his discharge would not in any event terminate his obligation to support his childern during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfillment thereof should be discharged. It is true his promise is to pay to the mother, but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose."

We think this language is equally applicable to the present case in that aspect of the decree which provides for the support of the minor children. The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the husband to support his children, and is not a debt in any just sense.

It is urged that the amendment of the law made by the act of February 5, 1903, excepting from the operation of a discharge in bankruptcy a decree for alimony due or to become due, or for the maintenance and support of the wife and minor children, is a legislative recognition of the fact that, prior to the passage of the amendment, judgments for alimony would be discharged. In *Dunbar* v. *Dunbar*, (190 U. S. *supra*) it was said that this amendment, while it did not apply to prior cases, may be referred to for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife and children. The amendment may also have been passed with a view to settling the law upon this subject and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both State and Federal, upon this question. Indeed, in view of the construction of the act in this court in *Audubon* v. *Shufeldt*, *supra*, it may be said to be merely declaratory of the true meaning and sense of the statute. (*United States* v. *Freeman*, 3 How. 556; *Bailey* v. *Clark*, 21 Wall. 284, 288; *Cope* v. *Cope*, 137 U. S. 682, 688.) The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce. Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a

fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes. Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children. While it is true in this case the obligation has become fixed by an unalterable decree, so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them as against the husband and father.

We find no error in the judgment of the Supreme Court of the State of New York, and the same is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.